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FOR: Any person who uses the Federal Register and Code of Federal Regulations.

WHO: Sponsored by the Office of the Federal Register.

WHAT: Free public briefings (approximately 3 hours) to present:

1. The regulatory process, with a focus on the Federal Register system and the public's role in the development of regulations.
2. The relationship between the Federal Register and Code of Federal Regulations.
3. The important elements of typical Federal Register documents.
4. An introduction to the finding aids of the FR/CFR system.

WHY: To provide the public with access to information necessary to research Federal agency regulations which directly affect them. There will be no discussion of specific agency regulations.

WHEN: Tuesday, May 10, 2011
9 a.m.–12:30 p.m.

WHERE: Office of the Federal Register
Conference Room, Suite 700
800 North Capitol Street, NW.
Washington, DC 20002

RESERVATIONS: (202) 741–6008

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CFR PARTS AFFECTED IN THIS ISSUE

A cumulative list of the parts affected this month can be found in the Reader Aids section at the end of this issue.

Rules and Regulations

Federal Register
Vol. 76, No. 89
Monday, May 9, 2011

This section of the FEDERAL REGISTER contains regulatory documents having general applicability and legal effect, most of which are keyed to and codified in the Code of Federal Regulations, which is published under 50 titles pursuant to 44 U.S.C. 1510.

The Code of Federal Regulations is sold by the Superintendent of Documents. Prices of new books are listed in the first FEDERAL REGISTER issue of each week.

DEPARTMENT OF ENERGY

10 CFR Parts 600, 603, 609, and 611

RIN 1990–AA36

Procedures for Submitting to the Department of Energy Trade Secrets and Commercial or Financial Information That Is Privileged or Confidential

AGENCY: Office of the General Counsel, Department of Energy (DOE).

ACTION: Final rule.

SUMMARY: DOE issues procedures to standardize across its various programs procedures for the submission and protection of trade secrets and commercial or financial information that is privileged or confidential, where such information is submitted by applicants for various forms of DOE assistance (including financial assistance such as grants, cooperative agreements, and technology investment agreements, as well as loans and loan guarantees). The procedures, established across DOE programs, are modeled after existing procedures DOE uses to process loan applications submitted to DOE's Advanced Technology Vehicles Manufacturing Incentive Program.

DATES: This rule is effective on June 8, 2011.

FOR FURTHER INFORMATION CONTACT: Daniel Cohen, Assistant General Counsel for Legislation, Regulation and Energy Efficiency, U.S. Department of Energy, 1000 Independence Avenue, SW., Washington, DC 20585–0121. Telephone: (202) 586–9523. E-mail: *1990-AA36@hq.doe.gov.* Include RIN 1990–AA36 in the subject line of the message.

SUPPLEMENTARY INFORMATION: DOE provides assistance to eligible applicants through a number of different programs. This assistance can take the form of financial assistance (*i.e.,* grants, cooperative agreements, and technology investment agreements), loan guarantees, and direct loans, among others. DOE has consistently sought to protect trade secrets and commercial or financial information that is privileged or confidential submitted by applicants for these forms of assistance, but the procedures required of applicants when submitting such information can vary. In today's final rule, DOE establishes procedures for the submission to DOE of trade secrets and commercial or financial information that is privileged or confidential meant to standardize DOE's procedures for processing and handling applicant submissions containing such information. The procedures are modeled after existing procedures DOE uses to process loan applications submitted to DOE's Advanced Technology Vehicles Manufacturing Incentive Program.

DOE makes minor changes to the Notice of Restriction on Disclosure and Use of Data in 10 CFR 600.15(b)(1), as well as corresponding changes to 10 CFR 600.15(a) and 600.15(b)(2) and (3). These changes are intended to allow for cross reference from other portions of Subpart H (specifically, Parts 609—Loan Guarantees for Projects that Employ Innovative Technologies and 611—Advanced Technology Vehicles Manufacturer Assistance Program) while recognizing that Part 600 does not otherwise apply to loans and loan guarantees.

DOE amends 10 CFR 600.15(b)(1) to require a party submitting information to DOE, at the time of submission, to identify and assert a claim of exemption regarding information it considers to be trade secrets or commercial or financial information that is privileged or confidential such that the information would be exempt from disclosure under the Freedom of Information Act (FOIA, 5 U.S.C. 552). This claim of exemption must be made by placing the following notice on the first page of the application or other document and specifying the page or pages to be restricted: "Pages [____] of this document may contain trade secrets or commercial or financial information that is privileged or confidential and exempt from public disclosure. Such information shall be used or disclosed only for evaluation purposes or in accordance with a financial assistance or loan agreement between the submitter and the Government. The Government may use or disclose any information that is not appropriately marked or otherwise restricted, regardless of source."

To further protect trade secrets and commercial or financial information that is privileged or confidential, DOE also adds a requirement in section 600.15(b)(1) that each page containing such data must be specifically identified and marked with text that is similar to the following: "May contain trade secrets or commercial or financial information that is privileged or confidential and exempt from public disclosure." In addition, each line or paragraph containing trade secrets or commercial or financial information that is privileged or confidential on the page or pages on which this statement appears must be marked with brackets or other clear identification, such as highlighting.

DOE acknowledges that the marking procedures set forth above may not be feasible on unalterable forms submitted through Grants.gov. In such cases only, submitters must include in a cover letter or the project narrative a notice containing language substantially similar to the following: "Forms [____] may contain trade secrets or commercial or financial information that is privileged or confidential and exempt from public disclosure. Such information shall be used or disclosed only for evaluation purposes or in accordance with a financial assistance or loan agreement between the submitter and the Government. The Government may use or disclose any information that is not appropriately marked or otherwise restricted, regardless of source." The cover letter or project narrative must also specify the particular information on such forms that the submitter believes to be trade secrets or commercial or financial information that is privileged or confidential.

DOE also amends 10 CFR 603.850 to require that the markings affixed to data for technology investment agreements that may contain trade secrets or commercial or financial information that is privileged or confidential conform to the marking requirements of 10 CFR 600.15.

In addition, DOE regulations implementing its loan guarantee program for projects that employ

innovative technologies under Title XVII of the Energy Policy Act of 2005 (42 U.S.C. 16511–16514) now cross-reference 10 CFR 600.15. These regulations are set forth at 10 CFR Part 609. In today's final rule, DOE thus establishes the same marking requirements as described above for any information submitted through the Title XVII loan application process, including pre-applications, applications, and any additional information provided by loan applicants. Similarly, DOE regulations implementing its Advanced Technology Vehicles Manufacturing (ATVM) Incentive Program at 10 CFR Part 611 will also cross-reference 10 CFR 600.15. DOE already applies to the ATVM program procedures virtually identical to those established in this notice. In this final rule, DOE establishes the marking requirements described above in the program's implementing regulations.

DOE received no comments on its proposed rule and made no changes to the proposal in today's final rule.

Procedural Issues and Regulatory Review

A. Review Under Executive Order 12866

This rule has been determined to be not significant for purposes of Executive Order 12866.

B. Review Under the Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) requires preparation of a regulatory flexibility analysis for any rule that by law must be proposed for public comment, unless the agency certifies that the rule, if promulgated, will not have a significant economic impact on a substantial number of small entities. As required by Executive Order 13272, "Proper Consideration of Small Entities in Agency Rulemaking" 67 FR 53461 (Aug. 16, 2002), DOE published procedures and policies on February 19, 2003, to ensure that the potential impacts of its rules on small entities are properly considered during the rulemaking process. 68 FR 7990. DOE has made its procedures and policies available on the Office of the General Counsel's Web site (*http://www.gc.doe.gov*).

DOE has reviewed today's rule under the Regulatory Flexibility Act and certifies that the rule will not have a significant impact on a substantial number of small entities. While DOE recognizes that some applicants for assistance may be small businesses according to SBA size standards, DOE believes that the impact on such applicants of the rule will not be significant. The rule does not change the information applicants are required to submit to apply for the various forms of DOE assistance. It merely instructs applicants how to mark information that they believe to be trade secrets or commercial or financial information that is privileged or confidential.

C. Review Under the Paperwork Reduction Act

The information collection requirements for the various forms of assistance to which the marking requirements in this rule will apply have been approved under OMB Control Numbers 1910–0400 (Financial Assistance Regulations) and 1910–5134 (Title XVII loan guarantee program).

Notwithstanding any other provision of the law, no person is required to respond to, nor shall any person be subject to a penalty for failure to comply with, a collection of information subject to the requirements of the PRA, unless that collection of information displays a currently valid OMB Control Number.

D. Review Under the National Environmental Policy Act

In this rule, DOE establishes procedures for the submission of information relating to various forms of assistance, including grants, cooperative agreements, technology investment agreements, loans, and loan guarantees. DOE has determined that this rule falls into a class of actions that are categorically excluded from review under the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*) and DOE's implementing regulations at 10 CFR part 1021. Specifically, this rule is a procedural rule covered by Categorical Exclusion A6 under 10 CFR Part 1021, subpart D, which applies to any rulemaking that is strictly procedural in nature. Accordingly, neither an environmental assessment nor an environmental impact statement is required.

E. Review Under Executive Order 13132

Executive Order 13132, "Federalism," 64 FR 43255 (August 4, 1999), imposes certain requirements on agencies formulating and implementing policies or regulations that preempt State law or that have other federalism implications. The Executive Order requires agencies to examine the constitutional and statutory authority supporting any action that would limit the policymaking discretion of the States and to carefully assess the necessity for such actions. The Executive Order also requires agencies to have an accountable process to ensure meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications. On March 14, 2000, DOE published a statement of policy describing the intergovernmental consultation process it will follow in the development of such regulations. 65 FR 13735. DOE has considered today's final rule in accordance with Executive Order 13132 and its policy and determined that this rule setting forth requirements for the marking of trade secrets and commercial or financial information that is privileged or confidential will not preempt State law or have any federalism impacts. No further action is required by Executive Order 13132.

F. Review Under Executive Order 12988

With respect to the review of existing regulations and the promulgation of new regulations, section 3(a) of Executive Order 12988, "Civil Justice Reform," imposes on Federal agencies the general duty to adhere to the following requirements: (1) Eliminate drafting errors and ambiguity; (2) write regulations to minimize litigation; and (3) provide a clear legal standard for affected conduct rather than a general standard and promote simplification and burden reduction. 61 FR 4729 (February 7, 1996). Section 3(b) of Executive Order 12988 specifically requires that Executive agencies make every reasonable effort to ensure that the regulation: (1) Clearly specifies the preemptive effect, if any; (2) clearly specifies any effect on existing Federal law or regulation; (3) provides a clear legal standard for affected conduct while promoting simplification and burden reduction; (4) specifies the retroactive effect, if any; (5) adequately defines key terms; and (6) addresses other important issues affecting clarity and general draftsmanship under any guidelines issued by the Attorney General. Section 3(c) of Executive Order 12988 requires Executive agencies to review regulations in light of applicable standards in section 3(a) and section 3(b) to determine whether they are met or it is unreasonable to meet one or more of them. DOE has completed the required review and determined that this rule meets the relevant standards of Executive Order 12988.

G. Review Under the Unfunded Mandates Reform Act of 1995

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA) (Pub. L. 104–4) requires each Federal agency to assess the effects of Federal regulatory actions on State, local, and Tribal governments and the private sector. For proposed regulatory actions likely to result in a rule that may cause expenditures by State, local, and Tribal

governments, in the aggregate, or by the private sector of $100 million or more in any one year (adjusted annually for inflation), section 202 of UMRA requires a Federal agency to publish estimates of the resulting costs, benefits, and other effects on the national economy. (2 U.S.C. 1532(a), (b).) UMRA also requires Federal agencies to develop an effective process to permit timely input by elected officers of State, local, and Tribal governments on a proposed "significant intergovernmental mandate." In addition, UMRA requires an agency plan for giving notice and opportunity for timely input to small governments that may be affected before establishing a requirement that might significantly or uniquely affect them. On March 18, 1997, DOE published a statement of policy on its process for intergovernmental consultation under UMRA. (62 FR 12820.) (This policy is also available at *http://www.gc.doe.gov*). Today's rule contains neither an intergovernmental mandate, nor a mandate that may result in the expenditure of $100 million or more in any year, so these requirements do not apply.

H. Review Under the Treasury and General Government Appropriations Act, 1999

Section 654 of the Treasury and General Government Appropriations Act, 1999 (Pub. L. 105–277) requires Federal agencies to issue a Family Policymaking Assessment for any rule that may affect family well-being. This rule will not have any impact on the autonomy or integrity of the family as an institution. Accordingly, DOE has concluded that it is not necessary to prepare a Family Policymaking Assessment.

I. Review Under Executive Order 12630

DOE has determined, under Executive Order 12630, "Governmental Actions and Interference with Constitutionally Protected Property Rights," 53 FR 8859 (March 18, 1988), that this regulation will not result in any takings which might require compensation under the Fifth Amendment to the U.S. Constitution.

J. Review Under the Treasury and General Government Appropriations Act, 2001

Section 515 of the Treasury and General Government Appropriations Act, 2001 (44 U.S.C. 3516, note) provides for agencies to review most disseminations of information to the public under guidelines established by each agency pursuant to general guidelines issued by OMB. OMB's guidelines were published at 67 FR 8452 (Feb. 22, 2002), and DOE's guidelines were published at 67 FR 62446 (Oct. 7, 2002). DOE has reviewed today's rule under the OMB and DOE guidelines and has concluded that it is consistent with applicable policies in those guidelines.

K. Review Under Executive Order 13211

Executive Order 13211, "Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use," 66 FR 28355 (May 22, 2001), requires Federal agencies to prepare and submit to OIRA at OMB a Statement of Energy Effects for any proposed significant energy action. A "significant energy action" is defined as any action by an agency that promulgates or is expected to lead to promulgation of a final rule, and that (1) is a significant regulatory action under Executive Order 12866 or any successor order; and (2) is likely to have a significant adverse effect on the supply, distribution, or use of energy; or (3) is designated by the Administrator of OIRA as a significant energy action. For any proposed significant energy action, the agency must give a detailed statement of any adverse effects on energy supply, distribution, or use should the proposal be implemented, and of reasonable alternatives to the action and their expected benefits on energy supply, distribution, and use.

DOE has concluded that today's regulatory action, which establishes marking requirements for information submitted to DOE that the submitter believes to be trade secrets or commercial or financial information that is privileged or confidential, is not a significant energy action because the rule is not likely to have a significant adverse effect on the supply, distribution, or use of energy, nor has it been designated as such by the Administrator at OIRA. Accordingly, DOE has not prepared a Statement of Energy Effects for the rule.

L. Review Under the Information Quality Bulletin for Peer Review

On December 16, 2004, OMB, in consultation with the Office of Science and Technology Policy, issued its Final Information Quality Bulletin for Peer Review (the Bulletin). 70 FR 2664 (Jan. 14, 2005). The Bulletin establishes that certain scientific information shall be peer reviewed by qualified specialists before it is disseminated by the Federal Government, including influential scientific information related to agency regulatory actions. The purpose of the bulletin is to enhance the quality and credibility of the Government's scientific information. DOE has determined that today's rule does not contain any influential or highly influential scientific information that would be subject to the peer review requirements of the Bulletin.

M. Congressional Notification

As required by 5 U.S.C. 801, DOE will report to Congress on the promulgation of this rule prior to its effective date. The report will state that it has been determined that the rule is not a "major rule" as defined by 5 U.S.C. 804(2).

Approval of the Office of the Secretary

The Secretary of Energy has approved publication of this rule.

List of Subjects in 10 CFR Parts 600, 603, 609, and 611

Accounting, Administrative practice and procedure, Colleges and universities, Confidential business information, Energy, Government contracts, Grant programs, Hospitals, Indians, Intergovernmental relations, Loan programs, Lobbying, Nonprofit organizations, Penalties, Reporting and recordkeeping requirements.

Issued in Washington, DC on May 2, 2011.

Daniel B. Poneman,

Deputy Secretary of Energy.

For the reasons stated in the preamble, DOE amends Subchapter H of Chapter II of Title 10, Code of Federal Regulations, to read as set forth below:

PART 600—FINANICIAL ASSISTANCE RULES

■ 1. The authority citation for Part 600 continues to read as follows:

Authority: 42 U.S.C. 7101 *et seq.;* 31 U.S.C. 6301–6308; 50 U.S.C. 2401 *et seq.,* unless otherwise noted.

■ 2. Section 600.15 is revised to read as follows:

§ 600.15 Authorized uses of information.

(a) *General.* Information contained in applications shall be used only for evaluation purposes unless such information is generally available to the public or is already the property of the Government. The Trade Secrets Act, 18 U.S.C. 1905, prohibits the unauthorized disclosure by Federal employees of trade secret and confidential business information.

(b) *Treatment of application information.* (1) An application or other document, including any unsolicited information, may include technical data and other data, including trade secrets and commercial or financial information that is privileged or confidential, which the applicant does not want disclosed to

the public or used by the Government for any purpose other than application evaluation.

(i) To protect such data, the submitter must mark the cover sheet of the application or other document with the following Notice:

Notice of Restriction on Disclosure and Use of Data

Pages [____] of this document may contain trade secrets or commercial or financial information that is privileged or confidential and is exempt from public disclosure. Such information shall be used or disclosed only for evaluation purposes or in accordance with a financial assistance or loan agreement between the submitter and the Government. The Government may use or disclose any information that is not appropriately marked or otherwise restricted, regardless of source.

(ii)(A) To further protect such data, except as otherwise provided in paragraph (b)(1)(iii) of this section, each page containing trade secrets or commercial or financial information that is privileged or confidential must be specifically identified and marked with text similar to the following:

May contain trade secrets or commercial or financial information that is privileged or confidential and exempt from public disclosure.

(B) In addition, each line or paragraph containing trade secrets or commercial or financial information that is privileged or confidential must be marked with brackets or other clear identification, such as highlighting.

(iii) (A) In the case where a form for data submission is unalterable, such as certain forms submitted through Grants.gov, submitters must include in a cover letter or the project narrative a notice like the following:

Forms [____] may contain trade secrets or commercial or financial information that is privileged or confidential and exempt from public disclosure. Such information shall be used or disclosed only for evaluation purposes or in accordance with a financial assistance or loan agreement between the submitter and the Government. The Government may use or disclose any information that is not appropriately marked or otherwise restricted, regardless of source.

(B) The cover letter or project narrative must also specify the particular information on such forms that the submitter believes contains trade secrets or commercial or financial information that is privileged or confidential.

(2) Unless DOE specifies otherwise, DOE shall not refuse to consider an application or other document solely on the basis that the application or other document is restrictively marked in accordance with paragraph (b)(1) of this section.

(3) Data (or abstracts of data) specifically marked in accordance with paragraph (b)(1) of this section shall be used by DOE or its designated representatives solely for the purpose of evaluating the proposal. The data so marked shall not be disclosed or used for any other purpose except to the extent provided in any resulting assistance agreement, or to the extent required by law, including the Freedom of Information Act (5 U.S.C. 552) (10 CFR Part 1004). The Government shall not be liable for disclosure or use of unmarked data and may use or disclose such data for any purpose.

(4) This process enables DOE to follow the provisions of 10 CFR 1004.11(d) in the event a Freedom of Information Act (5 U.S.C. 552) request is received for the data submitted, such that information not identified as subject to a claim of exemption may be released without obtaining the submitter's views under the process set forth in 10 CFR 1004.11(c)

PART 603—TECHNOLOGY INVESTMENT AGREEMENTS

■ 3. The authority citation for Part 603 continues to read as follows:

Authority: 42 U.S.C. 7101 *et seq.;* 31 U.S.C. 6301–6308; 50 U.S.C. 2401 *et seq.,* unless otherwise noted.

■ 4. Section 603.850 is revised to read as follows:

§ 603.850 Marking of data.

To protect the recipient's interests in data, the TIA should require the recipient to mark any particular data that it wishes to protect from disclosure as specified in 10 CFR 600.15(b).

PART 609—LOAN GUARANTEES FOR PROJECTS THAT EMPLOY INNOVATIVE TECHNOLOGIES

■ 5. The authority citation for Part 609 continues to read as follows:

Authority: 42 U.S.C. 7254, 16511–16514.

■ 6. Section 609.4 is amended by revising the introductory text to read as follows:

§ 609.4 Submission of Pre-Applications.

In response to a solicitation requesting the submission of Pre-Applications, either Project Sponsors or Applicants may submit Pre-Applications to DOE. The information submitted in or in connection with Pre-Applications will be treated as provided in 10 CFR 600.15 and must be marked as provided in 10 CFR 600.15(b). Pre-Applications must meet all requirements specified in the solicitation and this part. At a minimum, each Pre-Application must contain all of the following:

* * * * *

■ 7. Section 609.5 is amended by revising paragraph (d) to read as follows:

§ 609.5 Evaluation of Pre-Applications.

* * * * *

(d) After the evaluation described in paragraph (c) of this section, DOE will determine if there is sufficient information in the Pre-Application to assess the technical and commercial viability of the proposed project and/or the financial capability of the Project Sponsor and to assess other aspects of the Pre-Application. DOE may ask for additional information from the Project Sponsor during the review process and may request one or more meetings with the Project Sponsor. Any additional information submitted will be treated as provided in 10 CFR 600.15 and must be marked as provided in 10 CFR 600.15(b).

* * * * *

■ 8. Section 609.6 is amended by revising paragraph (a) to read as follows:

§ 609.6 Submission of Applications.

(a) In response to a solicitation or written invitation to submit an Application, an Applicant submitting an Application must meet all requirements and provide all information specified in the solicitation and/or invitation and this part. The information submitted in or in connection with Applications will be treated as provided in 10 CFR 600.15 and must be marked as provided in 10 CFR 600.15(b).

* * * * *

■ 9. Section 609.7 is amended by revising paragraph (c) to read as follows:

§ 609.7 Programmatic, technical and financial evaluation of Applications.

* * * * *

(c) During the Application review process DOE may raise issues or concerns that were not raised during the Pre-Application review process where a Pre-Application was requested in the applicable solicitation. Any additional information submitted to DOE will be treated as provided in 10 CFR 600.15 and must be marked as provided in 10 CFR 600.15(b).

* * * * *

PART 611—ADVANCED TECHNOLOGY VEHICLES MANUFACTURER ASSISTANCE PROGRAM

■ 10. The authority citation for Part 611 continues to read as follows:

Authority: Pub. L. 110–140 (42 U.S.C. 17013), Pub. L. 110–329.

■ 11. Section 611.101 is amended by revising the introductory text to read as follows:

§ 611.101 Application.

The information and materials submitted in or in connection with applications will be treated as provided in 10 CFR 600.15 and must be marked as provided in 10 CFR 600.15(b). An application must include, at a minimum, the following information and materials:

* * * * *

■ 12. Section 611.103 is amended by revising paragraph (a) to read as follows:

§ 611.103 Application evaluation.

(a) *Eligibility screening.* Applications will be reviewed to determine whether the applicant is eligible, the information required under § 611.101 is complete, and the proposed loan complies with applicable statutes and regulations. DOE can at any time reject an application, in whole or in part, that does not meet these requirements. Any additional information submitted to DOE will be treated as provided in 10 CFR 600.15 and must be marked as provided in 10 CFR 600.15(b).

* * * * *

[FR Doc. 2011–11239 Filed 5–6–11; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF COMMERCE

Bureau of Industry and Security

15 CFR Part 774

[Docket No. 110106012–1013–01]

RIN 0694–AF04

Implementation of the Understandings Reached at the 2010 Australia Group (AG) Plenary Meeting and Other AG-Related Clarifications and Corrections to the EAR

Correction

In rule document 2011–9613 appearing on pages 22017–22019 in the issue of April 20, 2011, make the following correction:

PART 774—[CORRECTED]

Supplement No. 1 to Part 774—[Corrected]

On page 22019, in the first column, instruction 4.c. is corrected to read as follows:

c. By removing the phrase "Glass or glasslined (including vitrified or enameled coatings)," where it appears in paragraph g.4, and adding in its place the phrase "Glass (including vitrified or enameled coating or glass lining);" and

[FR Doc. C1–2011–9613 Filed 5–6–11; 8:45 am]

BILLING CODE 9613–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 31

[TD 9524]

RIN 1545–BG45

Extension of Withholding to Certain Payments Made by Government Entities

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final regulations.

SUMMARY: This document contains final regulations relating to withholding by government entities. These regulations reflect changes in the law made by the Tax Increase Prevention and Reconciliation Act of 2005 that require Federal, State, and local government entities to withhold income tax when making payments to persons providing property or services. These regulations affect Federal, State, and local government entities that will be required to withhold and report tax from payments to persons providing property or services and also affect the persons receiving payments for property or services from the government entities.

DATES: *Effective Date:* These regulations are effective on May 9, 2011.

Applicability Date: For dates of applicability, see §§ 31.3402(t)–1(d), 31.3402(t)–2(i), 31.3402(t)–3(g), 31.3402(t)–4(u), 31.3402(t)–5(e), 31.3402(t)–6(d), 31.3402(t)–7(b), 31.3406(g)–2(i), 31.6011(a)–4(d), 31.6051–5(g), 31.6071(a)–1(g), 31.6302–1(n), and 31.6302–4(e).

FOR FURTHER INFORMATION CONTACT: A.G. Kelley, (202) 622–6040 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background

This document contains amendments to 26 CFR part 31 under section 3402(t) of the Internal Revenue Code (Code). This document also contains amendments to 26 CFR part 31 under sections 3406, 6011, 6051, 6071, and 6302 of the Code.

Section 3402(t) of the Code was added by section 511 of the Tax Increase Prevention and Reconciliation Act of 2005, Public Law 109–222 (TIPRA), 120 Stat. 345, which was enacted into law on May 17, 2006. Section 3402(t)(1) provides that the Government of the United States, every State, every political subdivision thereof, and every instrumentality of the foregoing (including multi-State agencies) making any payment to any person providing any property or services (including any payment made in connection with a government voucher or certificate program which functions as a payment for property or services) shall deduct and withhold from such payment a tax in an amount equal to 3 percent of such payment. Section 3402(t)(2) provides exceptions to withholding under section 3402(t).

Proposed regulations under sections 3402(t), 3406, 6011, 6051, 6071, and 6302 of the Code were published in the **Federal Register** on December 5, 2008 (REG–158747–06, 73 FR 74082, 2009–4 IRB 362).

After the issuance of the proposed regulations, section 1511 of the American Recovery and Reinvestment Act of 2009, Public Law 111–5 (ARRA), 123 Stat. 115, 355, extended the effective date of section 3402(t) withholding to payments made after December 31, 2011.

Notice 2010–91, 2010–52 IRB 915, provided interim guidance on the application of section 3402(t) to payments by debit cards, credit cards, stored value cards, and other payment cards.

Written comments were received in response to the proposed regulations, and a public hearing was held on April 16, 2009. All comments are available at *http://www.regulations.gov* or upon request. After consideration of all the comments, the proposed regulations are adopted as amended by this Treasury decision.

Summary of Comments and Explanation of Provisions

The Treasury Department and the IRS received numerous comments in response to the proposed regulations, all of which were considered in formulating the final regulations. Commenters generally expressed concerns about the administrative burdens of compliance and the revenue effect on persons subject to section 3402(t) withholding. The final regulations are intended to balance the legislative intent to construct a withholding and reporting regime for payments by government entities for property and services (other than those specifically excepted under section 3402(t)(2)) with the goal of alleviating administrative burdens on both

government entities required to withhold and persons receiving payments subject to withholding where appropriate.

As discussed in section IX of the preamble, these final regulations provide an additional one-year extension from the revised statutory effective date of payments made after December 31, 2011. Thus, under the final regulations, section 3402(t) withholding and reporting requirements apply to payments made after December 31, 2012, subject to an exception for payments made under contracts existing on December 31, 2012, that are not materially modified (but see section IX of this preamble for discussion of accompanying proposed regulations that would apply section 3402(t) withholding and reporting requirements to payments made under all contracts after December 31, 2013, regardless of whether the contract was existing on December 31, 2012, and had not been materially modified).

I. Government Entities Subject to Section 3402(t)

A. Exception for Political Subdivisions and Instrumentalities Making Total Payments Under $100,000,000 (Section 3402(t)(2)(G))

Section 3402(t)(2)(G) provides that section 3402(t) withholding does not apply to payments by a political subdivision of a State (or any instrumentality of that political subdivision) that makes less than $100,000,000 of payments for property or services annually (other than for payroll or of another type exempt from withholding under the regulations). Consistent with the proposed regulations, the final regulations provide as a general rule that eligibility for the exception for each calendar year is determined based on payments made during the accounting year ending with or within the second preceding calendar year. All payments for property and services during that accounting year, including payments that are less than the $10,000 payment threshold, must be considered except payments qualifying for any of the exceptions under § 31.3402(t)–4(a) through (q) of the final regulations (for example, payments to the employees of the government entity that are subject to income tax withholding and thus excludable under § 31.3402(t)–4(a) (such as salary payments) and payments to employees of the government entity with respect to their services as an employee that are excludable under § 31.3402(t)–4(i) (such as payments of nontaxable fringe benefits)).

Commenters stated that if the political subdivision's or instrumentality's yearly payments generally are near $100,000,000, but do not always equal or exceed $100,000,000, the entity could incur considerable expense and difficulty administering withholding in some years but not in others. In addition, providing for withholding in contracts would be problematic and uncertain. Other commenters noted that due to substantial unusual capital spending, a political subdivision or instrumentality could exceed the $100,000,000 threshold in one year, even though the entity usually makes annual total payments well below the threshold. The burden of applying section 3402(t) withholding for a single year because of one year of unusual spending could be considerable.

In response to these comments, the final regulations provide an optional rule under which a political subdivision or instrumentality may average the payments made during any four of the five consecutive accounting years ending with the accounting year that ends with or within the second preceding calendar year. An entity applying this optional rule must keep adequate records for each of the five years for the period of limitations for assessment applicable to the calendar year for which it claimed the exception. This rule is intended to provide a reasonable alternative method of determining expenditures for a political subdivision or instrumentality with an unusually high year of expenditures.

This optional rule will give greater predictability for future years and will allow political subdivisions and their instrumentalities to moderate the effect of unusual years of expenditures. The entity may apply the optional rule at its discretion for any given taxable year and is not required to file a form or otherwise indicate to the IRS that it is using the optional rule. Additionally, under the final regulations, if a political subdivision or instrumentality withholds under section 3402(t), pays (or deposits) the withheld tax, and reports this withholding on payments in any calendar year for which it does not qualify for the section 3402(t)(2)(G) exception under the general rule, but could have qualified under the optional rule, it will be deemed to have waived any right to use the optional rule for that year. Thus, an affected entity should decide before the beginning of the calendar year whether it will rely on the optional rule for that year.

One commenter requested a similar exception for Federal Government entities and State entities with total annual payments of less than $100,000,000. By its terms, section 3402(t)(2)(G) does not apply to the United States Government, States, or instrumentalities of the United States Government or States. Therefore, this comment was not adopted.

B. Determining Whether an Organization Is an Instrumentality

The proposed regulations requested comments on how to determine whether an organization is an instrumentality of a government entity. Commenters did not request a definition. The final regulations do not define the term *instrumentality,* but reserve the issue for future guidance. See § 31.3402(t)–2(e). Although the Code contains multiple references to government instrumentalities, neither the Code nor the regulations define the term *instrumentality*. Several revenue rulings provide guidance on determining whether an organization will be treated as an instrumentality of a government entity for purposes of other Code provisions. See Rev. Rul. 57–128, 1957–1 CB 311 (adopting a six-factor test for use in determining what is an instrumentality of a State or a political subdivision thereof for purposes of an exception from the requirement to pay tax under the Federal Insurance Contributions Act (FICA)); Rev. Rul. 65–26, 1965–1 CB 444; Rev. Rul. 65–196, 1965–2 CB 388; and Rev. Rul. 69–453, 1969–2 CB 182. These rulings may be applied by analogy to determine whether an entity is an instrumentality for purposes of section 3402(t) withholding until final guidance is issued defining the term *instrumentality* for purposes of section 3402(t). See § 601.601(d)(2)(ii)(*b*).

II. Payments Subject to Section 3402(t) Withholding

A. Payments by Credit Card or Other Payment Card

The final regulations reserve for future guidance the issue of the potential application of section 3402(t) withholding to payment card transactions (including payments by credit, debit, stored value, and other payment cards). See Notice 2010–91 and § 31.3402(t)–3(e). The Treasury Department and the IRS continue to study whether payments by payment card should be subject to section 3402(t) withholding and, if so, in what manner the withholding should apply. As provided in Notice 2010–91, the section 3402(t) withholding requirements and the related reporting requirements will not apply to any payment made by payment card for any calendar year beginning earlier than at least 18

months from the date further guidance is finalized applying section 3402(t) withholding to payments by payment card. This relief does not apply to convenience checks issued in connection with payment card accounts.

B. The $10,000 Payment Threshold

Consistent with the proposed regulations, the final regulations provide that a payment subject to withholding arises when the government entity or its payment administrator pays a person for providing property or services. The final regulations adopt the rule in the proposed regulations that withholding will not apply to any payment that is less than $10,000 (subject to the anti-abuse rule described in section II.B.3 of this preamble).

1. Amount of Payment Threshold

Commenters generally approved of the concept of a threshold, and many commenters approved of the proposed $10,000 threshold level. However, numerous commenters requested that the threshold be raised, and some commenters requested that the threshold be adjusted each year based on changes in the cost of living.

The final regulations adopt the payment threshold of $10,000, which corresponds to a minimum withholding of $300. This $10,000 threshold level strikes a reasonable balance between alleviating administrative burdens and preserving the legislative intent that the withholding requirement apply broadly. The final regulations do not adopt an annual cost-of-living adjustment to the threshold. Computer processing and transaction systems are becoming increasingly cost-effective so that increasing the threshold annually is not warranted.

2. Application of the Payment Threshold to Individual Payments

Some commenters requested that the payment threshold apply cumulatively rather than to individual payments. Under this suggestion, section 3402(t) withholding would begin to apply when the payee receives payments totaling $10,000 in the aggregate from the government entity during the calendar year, and then apply to all subsequent payments to the payee during the remainder of the year. The final regulations do not adopt this suggestion. As other commenters noted, one section or division of a government entity may not be able to coordinate its billing with another section's or division's billing on a real-time basis. Thus, a requirement to withhold immediately upon reaching an annual minimum payment threshold would require the establishment of new systems to track and coordinate payments.

3. Application of the Payment Threshold to Multiple Payments to the Same Recipient

The $10,000 threshold applies on a payment-by-payment basis; therefore, if a government entity makes a single payment of $10,000 or more for multiple items of property or services, the entity must withhold on the payment. For example, if a person bills a government entity $5,000 each day for seven days of daily services, but the entity pays the bills by making one $35,000 payment, the payment threshold is applied to the $35,000 payment.

Consistent with the proposed regulations, the final regulations provide that multiple payments by a government entity to a payee generally will not be aggregated in applying the $10,000 threshold. The final regulations also adopt the anti-abuse rule in the proposed regulations providing that if a payment is divided into multiple payments primarily to avoid the payment threshold, the payments will be treated as a single payment made on the date of the first payment for purposes of applying the threshold. For example, if a government entity is scheduled to make a contractual payment for landscaping services of $15,000 on July 2, 2013, but divides the payment into payments of $7,000 and $8,000 on July 1, 2013, and July 2, 2013, respectively, to avoid withholding, the government entity will be treated as having made a single payment of $15,000 on July 1, 2013. This anti-abuse rule will not apply if the primary reason for making multiple payments is unrelated to section 3402(t).

Some commenters expressed concerns about the anti-abuse rule. Some argued that it was too subjective and would lead to conflicts between government entities and payees. Commenters noted that in many cases, the payee controls the billing and the government entity cannot determine whether the payee manipulated the billing to avoid the threshold or engaged in a normal business practice. Commenters also requested guidance on which entity (the payor or the payee) determines whether the anti-abuse rule applies. Commenters asserted that theoretically every payment below $10,000 will need to be examined to determine whether the anti-abuse rule applies.

An anti-abuse rule is necessary because the parties could potentially avoid the threshold by manipulating the amount of each payment. Because the government entity is responsible for withholding and may not have sufficient information regarding the payee's billing process, the final regulations provide that the anti-abuse rule applies only if the government entity knew or should have known that the payment had been divided (whether by the government entity or as a result of divided billing) with the primary purpose of avoiding the withholding requirements. The final regulations further provide that in determining whether the anti-abuse rule applies, a significant factor is whether the government entity has exhibited a pattern or practice of intentionally dividing payments (or intentionally permitting divided billing) to avoid withholding. Thus, the anti-abuse rule is intended to apply only in a limited number of cases.

Additionally, the final regulations permit a government entity and a person providing services or property to that government entity to contractually agree that the government entity will or may withhold in accordance with the rules governing withholding under section 3402(t), on specified payments not subject to section 3402(t) withholding, including payments below $10,000. Therefore, the parties could contractually agree to permit the government entity to apply, in its discretion as it deemed appropriate, the anti-abuse rule. This type of contractual provision would enable the parties to avoid disputes about whether the anti-abuse rule applies. This provision in the final regulations permitting additional withholding does not apply to payments already subject to section 3402(t) withholding notwithstanding the contractual provision, including amounts subject to section 3402(t) withholding solely due to the anti-abuse rule.

4. Application of the Payment Threshold to a Single Payment Covering Multiple Billing Items

Commenters objected to applying the threshold to the payment amount where the government entity chooses for its convenience to make one payment for different "unrelated transactions" (which they termed "bundling" the payment), causing the payment to meet the $10,000 threshold. Commenters suggested that if a single payment covers more than one "unrelated" transaction, the threshold should apply separately to each transaction, invoice, or billing item, rather than to the full payment amount. According to these commenters, applying the threshold to bundled payments makes the threshold difficult to program into accounts payable systems because the threshold

amount cannot be applied at the time of the transaction but only at the time the payment is processed.

The final regulations adopt the proposed rule applying the threshold on a payment-by-payment basis rather than a billing item basis. A billing item approach would require formulating a method for identifying a billing item or a similar term, which may not be easily identifiable in every case. As a result, disputes would likely arise about the number and amount of valid billing items, raising both compliance issues for government entities and enforcement issues for the IRS. A billing item approach also would require the government entity to maintain records of the items covered by a particular payment, and the supporting documentation justifying the separate billing item treatment, increasing the administrative burden. This approach could also facilitate abuse by parties seeking to avoid the threshold by dividing billing items.

C. Payments to Contractors, Subcontractors, and Payment Administrators

Consistent with the proposed regulations, the final regulations provide that, if a government entity or its payment administrator makes a payment to a person that is subject to section 3402(t) withholding, no subsequent transfer of cash or property by that person to another person is treated as a payment for section 3402(t) purposes. Therefore, if the government entity contracts with a prime contractor for property and services, and that prime contractor separately contracts with subcontractors for delivery of certain property and services, section 3402(t) withholding applies only to payments by the government entity or its payment administrator to the prime contractor, and does not apply to successive payments by the prime contractor to its subcontractors.

Also consistent with the proposed regulations, the final regulations apply to payments made by the government entity or its payment administrator. A payment administrator is any person that acts with respect to a payment solely as an agent for a government entity by making the payment on behalf of the government entity to a person providing property or services to, or on behalf of, the government entity. The government entity is liable for the required withholding and responsible for all related reporting regardless of whether the government entity or its payment administrator makes the payment. Transfers of funds from a government entity to a payment administrator to be used by the payment administrator, on the government entity's behalf, to pay persons for providing property or services are not payments subject to section 3402(t) withholding. However, if the government entity pays the payment administrator a fee for its services, the fee is a payment subject to withholding.

Many commenters requested additional guidance on the application of section 3402(t) to prime contractors, subcontractors, and payment administrators to specific factual situations. The final regulations adopt the rules in proposed regulations without change. These rules provide general guidance that can be applied to various specific situations and it is not practicable to describe all those situations explicitly in the regulations. However, the Treasury Department and the IRS may issue other forms of guidance in the future if it is determined that such guidance is necessary to assist with particularly problematic situations.

D. Advance and Interim Payments

Commenters requested guidance on whether section 3402(t) withholding applies to any of the following payments that are made before the final delivery and acceptance of service by the government entity: Contract financing payments, performance-based payments, commercial advance payments, interim payments, progress payments based on cost, progress payments based on a percentage or stage of completion, or interim payments under a cost-reimbursement contract. Commenters requested exceptions for these types of payments because withholding would detrimentally affect the cash flows of contractors and could result in price increases for government contracts. Commenters also argued that in some cases withholding is unnecessary because amounts are already withheld from contract payments until the completion of a contract. Finally, commenters suggested that government entities are protected from loss through other provisions such as the Miller Act (40 U.S.C. 3131–3134, discussed in greater detail in section IV.E.1 of this preamble).

Commenters specifically requested that section 3402(t) withholding apply to contract financing payments on the date the government entity accepts the services or property provided under the contract. Under Federal Acquisition Regulations (FAR), a contractor is not entitled to liquidate contract financing payments until the government entity has accepted the property or services. On this basis, a commenter asserted that contract financing payments are not payments for property or services until the contract is settled and the property or services are "accepted" by the government entity. The commenter maintained that the payment date for section 3402(t) purposes should be the acceptance date because interest under the Prompt Payment Act (31 U.S.C. 3903) for late payments under a contract does not begin to run until the acceptance date.

The final regulations do not adopt these suggestions. Treating the acceptance date as the payment date would add administrative complexity to section 3402(t) withholding, as would any attempt to distinguish between payments in advance of performance by the contractor, interim payments for partial performance, and other designated payments for property or services. Treating the date the funds are disbursed as the payment date ensures that there will be funds upon which to withhold. For these reasons, the final regulations provide that payment is made and withholding applies when the funds are disbursed and not when the contract is settled and the services or property accepted.

E. Utility Payments

The proposed regulations provided that, unless otherwise excepted, utility payments are subject to section 3402(t) withholding on the same basis as payments for other property and services. Commenters requested that utility payments be exempted from the withholding requirement on the ground that utilities are already subject to regulation and that government entities might lose utility services if forced to withhold on payment of the utility bill.

There is no statutory exception for utility payments. In addition, all persons receiving payments subject to section 3402(t) withholding, including utility companies, are paid the full amount charged, albeit in the form of a combination of a cash payment and a deposit of tax made to the IRS. Thus, unless otherwise excepted, utility payments are subject to section 3402(t) withholding.

F. Other Payments

Commenters requested exemptions from withholding or lower rates of withholding based on a particular industry's profit margin or a particular payee's expectation that it will not have any income tax liability (because, for example, the payee had net operating losses). Commenters also requested exemptions for payees that are current in their Federal tax payments. The final regulations do not adopt these suggestions because differing rates for

differing industries or taxpayers are not contemplated by the statute and would raise administrative complexities.

In addition, many commenters requested guidance on whether certain types of payments or designated portions of payments are payments for property or services subject to section 3402(t) withholding. The final regulations do not adopt most of these suggestions because the general rules provide sufficient guidance. For example, commenters requested guidance on certain amounts that typically are part of a payment for a specific service or property, but generally are stated separately in invoices to government entities, such as fuel surcharges. The final regulations do not except separately stated costs (other than the optional rule permitting sales, excise, and value-added taxes to be excepted from the amount subject to section 3402(t) withholding). In general, separately stated items such as fuel surcharges are treated as part of the payment for property or services by the government entity, and therefore are subject to section 3402(t) withholding unless an exception applies. For example, the amount subject to withholding includes late payment fees (that are not interest) and shipping and handling costs in connection with the purchase of property that is subject to section 3402(t) withholding.

Commenters also requested guidance on determining the amount subject to withholding when a portion of one payment is subject to withholding, but the remainder of the payment is excepted from withholding. Commenters asserted that it would be difficult to identify which portion of the payment was excepted and to apply withholding only to the remainder. In response to these administrative concerns, the final regulations permit government entities to withhold on the full amount of a payment that combines an amount subject to withholding and an amount excepted from withholding, provided the payee has consented to this additional withholding.

Commenters requested guidance on determining the amount of withholding when a payment for property or services to a person is subject to offsets for the person's outstanding debt or other amounts owed to the government entity. Because there is no exclusion or other provision under section 3402(t) for offsets, the payment to which the section 3402(t) withholding applies is not reduced by offsets. Rather, the amount of the payment subject to section 3402(t) withholding includes any portion of the payment that is offset to pay debt owed to the government entity or other offsets.

IV. Payments Excepted From the Section 3402(t) Withholding Requirements

A. Payments to Certain Exempt Payees (Section 3402(t)(2)(E))

Consistent with the proposed regulations, the final regulations except from section 3402(t) withholding payments to other government entities required to withhold, to foreign governments, and to tax-exempt organizations as provided in section 3402(t)(2)(E). A commenter asked whether the exception for payments to tax-exempt organizations extends to payments that are included in determining the organization's unrelated business income that is subject to income tax. A payment to a tax-exempt organization is excepted from section 3402(t) withholding regardless of whether it is treated as unrelated business income.

B. Payments to Indian Tribal Governments

Consistent with the proposed regulations, the final regulations exempt payments to Indian Tribal governments. Because Indian Tribal governments are not subject to United States income tax, subjecting payments made by government entities to Indian Tribal governments to section 3402(t) withholding would be unduly burdensome. In response to comments, the final regulations also exempt payments to passthrough entities that are owned 80 percent or more by one or more persons each of which is an Indian Tribal government or a person described in section 3402(t)(2)(E).

C. Identifying Exempt Payees

Commenters requested guidance on how to identify exempt payees. Exempt payees include: (1) Government entities required to withhold under section 3402(t), foreign governments, tax-exempt organizations, and Indian Tribal governments; (2) passthrough entities that are 80 percent or more owned by those types of entities; and (3) nonresident alien individuals and foreign corporations that receive certain types of payments (and partnerships that receive certain types of payments and that are 80 percent or more owned by nonresident alien individuals and foreign corporations). The Treasury Department and the IRS expect to issue additional guidance on how a payee can claim an exemption. The guidance is expected to provide that if the government entity receives a payee statement indicating under penalties of perjury that the payee qualifies for an exemption from section 3402(t) withholding and identifying the particular exemption, the entity will be able to rely on that statement unless it knew or had reason to know that the payee did not actually qualify for the exception. The guidance is also expected to provide that a government entity need not obtain a payee statement if the name of the payee reasonably indicates or the payor knows the payee to be a government entity (including an Indian Tribal government) or foreign government. However, it is not anticipated that this "eyeball" test would apply to tax-exempt organizations, foreign corporations, nonresident alien individuals, or passthrough entities.

D. Payments of Interest (Section 3402(t)(2)(C))

Section 3402(t)(2)(C) excepts payments of interest from section 3402(t) withholding. Two commenters requested that a definition of interest be provided, and other commenters inquired whether certain specific types of payments are payments of interest for purposes of this exception.

The Code and the regulations do not provide a general definition of interest. Rather, a definition of interest has arisen through case law. Generally, under long-standing case law, interest is compensation paid for the use or forbearance of money. See, for example, *Old Colony R.R. Co.* v. *Commissioner,* 284 U.S. 552 (1932), 1932–1 CB 274; *Deputy* v. *DuPont,* 308 U.S. 488 (1940), 1940–1 CB 118; see also *Thompson* v. *Commissioner,* 73 T.C. 878, 887 (1980) (interest is the charge per unit of time for the use of borrowed money); *Dickman* v. *Commissioner,* 465 U.S. 330, 337 (1984), 1984–1 CB 197 (interest is the equivalent of rent for the use of funds). The general standard, as developed through the case law, may be applied to particular facts and circumstances. Thus, the final regulations do not provide a definition of interest. However, the Treasury Department and the IRS continue to study whether any particular guidance with respect to the application of section 3402(t) to interest payments may assist taxpayers in complying with the section 3402(t) withholding and reporting requirements, and accordingly continue to reserve that section. See § 31.3402(t)–4(c).

E. Payments for Real Property (Section 3402(t)(2)(D))

1. Construction Payments

Section 3402(t)(2)(D) excepts payments for real property from section 3402(t) withholding. Consistent with the proposed regulations, the final regulations provide that the term *payments for real property* includes payments for the purchase and the leasing of real property, but does not include payments for the construction of buildings or other public works projects, such as bridges or roads.

Commenters requested that payments for construction be treated as payments for real property. One commenter interpreted 40 U.S.C. 3131–3134 (the "Miller Act") as already protecting the Federal Government for taxes owed by the contractor. The commenter stated that the Miller Act mandates that the contractor provide a performance bond to protect the Government, and a separate payment and performance bond to protect all persons supplying labor and material in carrying out the work provided for in the contract. According to the commenter, the protection afforded by these bonds includes taxes due under the Code. See 40 U.S.C. 3131(c)(1).

The tax protection afforded by these bonds relates to employment taxes deducted from wages, not to income taxes which the contractor may owe. Therefore, these performance bonds do not protect against a contractor's failure to pay its correct income tax liability, and the Miller Act does not provide the Federal Government protection for the contracting entity's income tax liability.

Another commenter suggested that treating payments for construction as payments for real property would be consistent with other tax provisions, including section 460(e)(4) and § 1.460–3(a) (defining the term *construction contract* for purposes of determining whether an exception from the required use of the percentage of completion method in determining taxable income applies), and § 1.263A–8 (defining the term *real property* to include land, buildings, and inherently permanent structures, and the structural components of both buildings and inherently permanent structures for purposes of the requirement to capitalize interest under section 263A). Another commenter cited other Code sections and regulations, including: (1) Section 469 (relating to passive activity losses and credits and providing that a "real property trade or business" includes "any real property development, redevelopment, construction, reconstruction, acquisition, conversion, rental, operation, management, leasing, or brokerage trade or business"); (2) section 856 (defining "interests in real property" to include "fee ownership and co-ownership of land or improvements thereon, leaseholds of land or improvements thereon, options to acquire land or improvements thereon, and options to acquire leaseholds of land or improvements thereon"); and (3) § 1.1031(a)–1(b) (relating to like-kind exchanges and providing that the fact that any real estate involved is improved or unimproved is not material, for that fact relates only to the grade or quality of the property and not to its kind or class).

The final regulations do not adopt these suggestions. None of these authorities provides as a general rule that payments for construction are payments for real property. Moreover, the Code and regulations sections cited serve different purposes. The relevant distinction here is between payment for a completed building (a payment for real property), and payment for the services and materials used to construct a building (not a payment for real property). There is no evidence that Congress intended to exempt payments for construction. Additionally, an exemption for construction would substantially reduce the scope of payments subject to section 3402(t) withholding.

2. Lease Payments

The proposed regulations provided that the exemption for payments for real property extends to payments for the leasing of real property. A commenter asked whether payments for construction in leased buildings are treated as payments for real property if the government entity pays the person providing the property or services directly for facility improvements rather than the lessor. Commenters also asked whether payments to the lessor for services or property (such as for utilities or insurance) or for services under the lease agreement (such as for utilities provided at the lessor's expense) are considered payments for the lease. In addition, commenters asked whether payments to third parties required by the lease agreement (such as payments for utilities and insurance) are considered payments for the lease.

The final regulations distinguish between payments to the lessor as part of the lease and payments to a third party. Payments to the lessor that are required under the lease agreement, such as payments for utilities or insurance, are payments for leasing, and are not subject to section 3402(t) withholding. In contrast, payments to third parties for services or property are subject to section 3402(t) withholding, even if required by the lease. Thus, under the final regulations, the lease terms generally govern whether payments for leasehold improvements and for services or property in connection with a lease are subject to section 3402(t) withholding. However, because of the potential to avoid the application of withholding to payments for construction by temporarily leasing before purchasing, rather than simply purchasing, the property on which the construction will occur, payments for construction are subject to section 3402(t) withholding even if required by a lease and paid to the lessor.

F. Payments Subject to Other Withholding (Section 3402(t)(2)(A) and (B))

Section 3402(t)(2)(A) excepts from section 3402(t) withholding amounts that are subject to withholding under another provision of chapter 3 or chapter 24 (other than section 3406). Commenters asked whether unpaid compensation paid to beneficiaries or the estates of deceased employees is subject to section 3402(t) withholding. Although such amounts generally are not subject to wage withholding under section 3402(a) (see Rev. Rul. 86–109, 1986–2 CB 196), the final regulations provide that these payments are excepted from section 3402(t) withholding under section 3402(t)(2)(I) as payments to an employee.

G. Payments Made Pursuant to a Classified or Confidential Contract (Section 3402(t)(2)(F))

Section 3402(t)(2)(F) excepts payments made pursuant to a classified or confidential contract described in section 6050M(e)(3). Commenters asked whether this exception applies to other government operations not specifically covered by section 6050M(e)(3), recommending that the exception apply to any contract whose subject matter contains any scope of work subject to the National Industrial Security Program Operating Manual (NISPOM). Because of the express statutory language describing the confidential contracts to which the exception applies, the final regulations do not extend the exception beyond contracts described in section 6050M(e)(3).

H. Payments in Connection With a Public Welfare or Public Assistance Plan (Section 3402(t)(2)(H))

Section 3402(t)(2)(H) excepts from section 3402(t) withholding any payment in connection with a public

assistance or public welfare program for which eligibility is determined by a needs or income test. Consistent with the proposed regulations, the final regulations adopt a broad definition of *in connection with* to include payments made to third parties under a public assistance or public welfare program for the benefit of the recipient of benefits under the program. Consistent with the legislative history, a program for which eligibility is determined under a needs or income test does not include a program under which eligibility is based on age only (for example, Medicare). For purposes of this exception, a program providing disaster relief to victims of a natural or other disaster is considered to be a program for which eligibility is determined under a needs test.

Many commenters asked that the regulations address specific benefits under various plans. Questions about specific plans can be resolved by applying the statute and these final regulations, and special rules are not needed. However, the Treasury Department and the IRS may issue other guidance in the future, as necessary to address arrangements to which it is particularly difficult to determine the application of the statute and these final regulations.

Commenters asked how section 3402(t) applies when a government office or portion of a government office is used to administer a public welfare program. Commenters asked whether payments for expenses of that office (utilities, property insurance, maintenance) that are attributable to administering the public welfare program qualify as payments made in connection with a public welfare program under section 3402(t)(2)(H). The final regulations provide that government entities may determine the portion of any payment that is attributable to expenses to administer the public welfare program using any reasonable allocation method (including, for example, using prospective budget allocations). To ease administration, the final regulations also provide that, if a government entity makes a reasonable, good faith determination that only an insignificant portion of the government office's payments are attributable to administering a public welfare program (or to functions other than administering a public welfare program), that insignificant portion may be disregarded.

I. Payments to a Government Employee for Services as an Employee (Section 3402(t)(2)(l))

Section 3402(t)(2)(I) excepts payments to a government employee for the employee's services as an employee. Consistent with the proposed regulations, the final regulations interpret this exception broadly to exclude any form of compensation that is paid to the employee or on the employee's behalf. For example, the final regulations exclude employer and employee contributions to employee benefit and deferred compensation plans, employer-provided fringe benefits, and employer payments for insurance under the Federal Employees Health Benefits Program.

The final regulations further provide that, consistent with the proposed regulations, the section 3402(t)(2)(l) exception applies to payments to employees under an accountable plan for the employee's business travel expenses, and to payments made by the employee to providers of the employee's travel, meals, and lodging when the employee is traveling on government business and is reimbursed under the accountable plan. Payments to an employee made under a reimbursement or other expense allowance arrangement that do not exceed the substantiated expenses are treated as paid under an accountable plan and are not wages if the arrangement meets the requirements of section 62(c) and the expenses are substantiated within a reasonable period of time. *See* § 31.3401(a)–4(a). In contrast, payments to an employee under a nonaccountable plan are includible in wages subject to income tax withholding under section 3402(a), and thus are excepted from section 3402(t) withholding by section 3402(t)(2)(A).

Commenters requested that payments by a government entity to third party providers (and not to an employee) for employee travel and lodging also be excepted from section 3402(t) withholding, arguing that these payments are another way to pay for employee business travel expenses and should be excepted in the same manner as payments made under accountable plans. Commenters argued that applying withholding in this instance will complicate the travel arrangement process, reduce the use of more efficient central billing accounts, and create unjustified discrepancies in travel expense reimbursements based on the employer method of payment.

The section 3402(t)(2)(I) exception by its terms applies only to payments to employees (or their successors in interest). If the government entity pays a provider directly for employee travel expenses, there is no payment from the government entity to the employee to invoke this exception. Payments to the provider by the government entity are payments for property and services, and therefore subject to section 3402(t) withholding unless another exception applies. The exception for employee fringe benefits does not apply where a payment is made directly to the provider because, while related to the provision of a fringe benefit to the employee, the payment itself is not a fringe benefit and is made to a third party rather than to the employee. However, payments made by payment card are excepted pending future guidance. See Notice 2010–91.

J. Grants

The proposed regulations did not provide an explicit exception for grant payments. Commenters requested that all grant payments be excluded from section 3402(t) withholding because they are "non-exchange" transactions in which the government entity is not making a payment for property or services for the direct benefit or use of the government entity. According to commenters, grant payments are distinguishable from payments in a transaction with a vendor in which a government entity is directly purchasing property or services for its own benefit or use.

Commenters also recommended that section 3402(t) withholding not apply to the use of grant funds by grant recipients that are complying with the grant eligibility and award process. One commenter cited the example of a city or county fire department that receives a grant from a government entity specifically for the purchase of an emergency response vehicle. If the purchase of an emergency response vehicle by the local fire department were subject to section 3402(t) withholding, the commenter maintained the withholding would divert Federal grant money from the authorized acquisition use into the three percent withholding process.

In cases where the grant recipient is another government entity or a tax-exempt organization, the grant payment will be excepted from section 3402(t) withholding under section 3402(t)(2)(E). In addition, grant payments may qualify as payments made in connection with a public assistance or public welfare program for which eligibility is determined by a needs or income test, and thus be excepted from withholding under section 3402(t)(2)(H). Thus, it seems likely that many grant payments

will qualify for these statutory exceptions.

In light of the administrative difficulty and potential frustration to the intended use of the grant proceeds that may arise, the final regulations explicitly except all grants from section 3402(t) withholding. For this purpose, the final regulations define a grant as a transfer of funds by a government entity to a recipient (which may be a state government, local government, or other recipient) pursuant to an agreement reflecting a relationship between the government entity and the recipient when (1) the principal purpose of the relationship is to transfer a thing of value to the recipient to carry out a public purpose of support or stimulation authorized by law instead of acquiring (by purchase, lease, or barter) property or services for the direct benefit or use of the government entity; and (2) substantial involvement is not expected between the government entity and the recipient when carrying out the activity contemplated in the agreement.

The exception from section 3402(t) withholding for grants does not apply to the distribution of grant proceeds by a government entity. Commenters' suggestions that grant proceeds be permanently excepted from withholding if the grant recipient is using the proceeds for the purposes specified in the grant is not supported by the statute and would be difficult to administer. Tracing would be required to determine which government entity purchases had been made with grant proceeds. Tracing would be particularly difficult if the grant agreement does not identify specific uses for the proceeds (for example, to purchase items necessary to improve emergency response time, which may include an additional emergency response vehicle) or if only a portion of a payment consists of grant proceeds. Accordingly, the final regulations do not adopt this suggestion.

K. Sales Tax, Excise Tax, and Value-Added Tax

Commenters requested guidance on whether the payment subject to withholding includes the amount of any sales tax, excise tax, or value-added tax. Sales taxes are generally paid by the purchaser, collected by the vendor, and remitted to the state. The sales tax amount generally is not included in the vendor's gross income.

By comparison, information reporting under section 6041 and related backup withholding under section 3406 apply only to payments that are includible in the payee's income. Therefore, if the payee is liable for sales tax and the payor includes the amount of sales tax in the total payment to the payee, the payor includes the amount of sales tax on Form 1099–MISC, "Miscellaneous Income," as part of the reportable payment. In contrast, if (as is generally the case) the payor is liable for any sales tax and the payee merely collects sales tax from the payor, the payor does not include sales tax in the total amount reported on Form 1099–MISC.

A different reporting rule applies to reportable payment card transactions under section 6050W. Section 1.6050W–1(a)(6) provides that the gross amount reportable on Form 1099–K, "Merchant Card and Third Party Network Payments," is the total dollar amount of aggregate reportable payment transactions for each participating payee without regard to any adjustments for credit, cash equivalents, discount amounts, fees, refunded amount or any other amounts. Thus, the gross amount reported on Form 1099–K includes the amount of sales tax, excise tax, or value-added tax paid as part of a payment transaction.

Similar to reporting under section 6050W, but in contrast to reporting under section 6041, section 3402(t) withholding does not depend on whether an amount is includible in gross income. The entire amount paid for property or services is subject to withholding regardless of whether the vendor realizes a profit on transactions covered by the payments. Accordingly, the final regulations provide that the amount subject to withholding and reporting includes any sales, excise or value-added tax. However, the final regulations also permit government entities to exclude the amount of any sales, value-added, or excise tax, for purposes of section 3402(t) withholding, provided the exclusion is applied consistently to all payments to a given payee during the calendar year. This rule is similar to the rules permitting payors to exclude the amount of the wager from gambling winnings for reporting and withholding purposes under § 31.3406(g)–2(d)(2) or to exclude commissions and option premiums in determining gross proceeds from securities sales for reporting purposes under § 1.6045–1(d)(5).

L. Loan Guarantees

Commenters requested guidance on whether loan guarantees provided by government entities and payments on loan guarantees are subject to section 3402(t) withholding. The final regulations provide that the loan guarantee itself (meaning a guarantee provided by a government entity on a loan by a lender) is not a payment subject to section 3402(t). The underlying amounts are still loans and guaranteeing a loan or making a loan that is expected to be repaid through the payment of principal and interest is not a payment for property or services.

Payments of principal and interest by the government entity as guarantor of the loan so that the borrower can continue performing services under the contract are also not subject to withholding under section 3402(t). The government entity is making these payments as guarantor of the loan, and the payments are being made to the lender, not to a third party contractor that is performing services or transferring property. Thus, the final regulations provide that government entity payments of principal and interest on a loan pursuant to a loan guarantee are not subject to section 3402(t) withholding.

Under some circumstances, borrowers use the funds from guaranteed loans to fund a specific project. As part of a loan guarantee, the government has the right to assume the operation of the underlying project if the borrower ceases making payments on the loan. If the government entity (through a right of subrogation) assumes the operation of the underlying project, the government entity as the operator of the project makes payments to the contractors providing services and property for the project. In that case, payments by the government entity to third party contractors are payments for property or services. Although the government exercised its right of subrogation pursuant to the loan guarantee or the underlying loan, and not as a party to the underlying contract between the borrower and the third party contractors, the government is stepping into the borrower's shoes and making payments for property or services directly to the third party contractors. Accordingly, the final regulations provide that section 3402(t) withholding applies in that case.

M. Debt Repayments and Stock and Bond Purchases

Commenters requested clarification that a government entity's repayments of principal on a loan are not subject to section 3402(t) withholding. Generally, repayments of principal on a loan will not be subject to section 3402(t) withholding because they are not payments for property or services. However, if a government entity issues a debt obligation to a person providing services as part of the purchase price, the debt's fair market value is subject to section 3402(t) withholding when the obligation becomes effective, unless an exception applies. If a government

entity issues a debt obligation to a person providing property as part of the purchase price, the debt's issue price as determined under section 1273 or 1274, as applicable, is subject to section 3402(t) withholding unless an exception applies (for example, the exception for payments for real property will apply to a debt obligation issued as part of a government entity's purchase of real property). For administrative convenience, the regulations allow the government entity and the person providing property to agree to use the stated principal amount of the debt obligation in lieu of the issue price as the amount of the payment attributable to the debt obligation that is subject to section 3402(t) withholding. Thus, for example under these rules, if a government entity pays a person in 2013 for the performance of services with $50,000 cash and a 5-year note valued at $50,000, then the note's fair market value would be subject to section 3402(t) withholding in 2013 along with the cash payment, but the repayment of the principal after the note matured in 2018 would not be subject to section 3402(t) withholding. If a government entity uses a third party debt obligation (a debt obligation issued by another government entity or by an entity other than a government entity) to pay for property or services, the fair market value of the debt obligation is subject to section 3402(t) withholding, unless an exception applies.

The final regulations also except payments to purchase stock, bonds, and other negotiable instruments primarily for investment purposes. Although these payments are for intangible property, withholding on purchases in stock and bond markets is not practicable given the functioning of the investment markets in which buyers and sellers are paired on a virtually anonymous basis. However, a government entity's payment of investment advisory fees to investment advisors (including a payment from the government entity's account) is a payment for services subject to section 3402(t) withholding. In contrast, investment advisory fees paid, for example, by a mutual fund in which a government entity owns shares are not subject to section 3402(t) withholding, since these payments are not made by the government entity.

V. Application of Section 3402(t) to Passthrough Entities

The final regulations generally adopt the same basic rules as the proposed regulations on applying section 3402(t) where either the payor or the payee is a partnership or S corporation (a passthrough entity). Payments from a passthrough entity generally are not subject to section 3402(t) withholding unless 80 percent or more of the passthrough entity is owned in the aggregate by government entities required to withhold under section 3402(t)(1). Similarly, payments to a passthrough entity generally are subject to section 3402(t) withholding unless 80 percent or more of the passthrough entity is owned in the aggregate by persons described in section 3402(t)(2)(E) (government entities required to withhold under section 3402(t)(1), tax-exempt entities, and foreign governments) and Indian Tribal governments. Expanding on the exceptions in the proposed regulations, the final regulations additionally provide that certain payments to a partnership that is 80 percent or more owned by foreign corporations or nonresident alien individuals are not subject to section 3402(t) withholding. This exception does not apply to S corporations because nonresident alien individuals and foreign corporations are not permissible shareholders of an S corporation under section 1361(b)(1). The regulations also provide that, as a general rule, whether a passthrough entity is subject to section 3402(t) is determined on the first day of the passthrough entity's taxable year. However, any manipulation of the ownership percentage with intent to avoid application of section 3402(t) will be recharacterized as appropriate to reflect the actual ownership percentage. Because the government entity is responsible for withholding and may not have sufficient information regarding the payee's ownership structure, the final regulations provide that this rule applies only if the government entity knew or should have known that the payee's ownership percentage had been manipulated with intent to avoid application of section 3402(t).

Commenters requested that payments to all passthrough entities be excepted from section 3402(t) withholding. The final regulations do not adopt this suggestion. A passthrough entity exemption would create opportunities for payees to circumvent section 3402(t) by using passthrough entities to receive government payments.

VI. Deposits and Reporting of Amounts Withheld Under Section 3402(t)

The final regulations adopt the same reporting and payment rules for section 3402(t) withholding purposes as the proposed regulations. Final regulations under section 6011 provide that the payor required to withhold under section 3402(t) must file Form 945, "Annual Return of Withheld Federal Income Tax," reporting the amounts withheld. Final regulations under section 6302 provide that the amounts withheld under section 3402(t) must be deposited and reported in the same manner as other nonpayroll withheld amounts, such as withholding on gambling winnings and pensions. Pursuant to existing regulations, these amounts are treated as if they were employment taxes for purposes of the deposit rules, but are subject to special rules for determining the payor's deposit schedule. See § 31.6302–4. Additionally, final regulations under section 6051 provide that payors required to withhold amounts under section 3402(t) must file information returns and furnish payee statements on Form 1099–MISC, "Miscellaneous Income" (or any successor form), reporting such payments and tax withheld. Because this reporting is pursuant to regulations under section 6051, the exceptions provided in the regulations under section 6041 relating to Form 1099 do not apply.

VII. Crediting of Amounts Withheld

A. Credit Against Income Tax

Commenters requested that the regulations permit fiscal year taxpayers to credit amounts withheld against their income tax liability for the fiscal year in which the tax is withheld. The final regulations do not adopt this suggestion because it is inconsistent with the statute. Section 31 governs the taxable year against which a taxpayer may credit income tax. Section 31(a)(1) provides that "[t]he amount withheld as tax under chapter 24 shall be allowed to the recipient of the income as a credit against the tax imposed by this subtitle." Chapter 24 includes section 3402(t), and section 31(a)(1) is in subtitle A, income taxes. Thus, by its terms, section 31(a)(1) applies to persons who have had income tax withheld from a payment pursuant to section 3402(t). Section 31(a)(2) provides the general rule on the timing of the allowance of the credit allowed under section 31(a)(1): "The amount so withheld during any calendar year shall be allowed as a credit for the taxable year beginning in such calendar year. If more than one taxable year begins in a calendar year, such amount shall be allowed as a credit for the last taxable year so beginning." Thus, absent a special rule, section 31(a)(2) generally applies for purposes of withholdings required under chapter 24, which includes section 3402(t).

Section 31(c) provides a special rule solely for backup withholding. Under

section 31(c), any credit allowed by section 31(a) for backup withholding under section 3406 must be allowed for the taxable year of the recipient of the income in which the income is received. Section 31(c) is limited by its terms to section 3406 withholding only, and thus does not apply to section 3402(t) withholding.

Practical considerations also support the section 31(a)(2) crediting rule. Taxpayers generally will have received Forms 1099–MISC reporting the withholding prior to filing income tax returns crediting the income tax withheld, promoting accuracy in return filing.

B. Credit Against Estimated Income Tax Liability

Commenters requested that taxpayers be permitted to credit the income tax withheld against the estimated tax liability for the specific tax quarter in which the income tax is withheld. However, the Code specifically provides that crediting for estimated tax purposes occurs in the taxable year in which the tax withheld may be taken as a credit against income tax liability. See sections 6654(g)(1) and 6655(g)(1)(B). Thus, the final regulations do not adopt this comment.

C. Credit Against Employment Taxes or Other Taxes

Many commenters requested that taxpayers be permitted to credit their section 3402(t) withholding against employment taxes on wages or other taxes. The final regulations do not adopt this suggestion. Section 3402(t)(3) directs that crediting occur under the rules in section 31(a), which provides for crediting against income tax. As noted in the preamble to the proposed regulations, if a statute permits income tax payments to be treated as employment tax payments, or vice versa, it makes specific provision for that treatment. See, for example, section 3510(b) (providing that domestic employment taxes are treated as taxes due for estimated tax purposes under section 6654); and section 31(b) (providing for the crediting against income tax of the special refund of social security tax under section 6413(c) applicable when an employee receives wages from two or more employers in excess of the social security contribution and benefit base). The Code does not provide for section 3402(t) withholding to be treated as payments of the taxpayer's employment tax liability. In addition, payments of income tax and employment taxes occur under different processes, using different forms, and are subject to different procedures for corrections of underpayments and overpayments, as well as different audit procedures and potential penalties. Therefore, the crediting of an amount withheld for income tax against an employment tax obligation is not administratively feasible.

D. Credits for Amounts Withheld on Payments to Passthrough Entities

Amounts withheld on payments to passthrough entities are subject to the same crediting rules as payments made to other entities. Thus, a passthrough entity with a fiscal year may only claim the credit for its fiscal year beginning in the calendar year during which the amount was withheld pursuant to section 31(a)(2). The timing of when the owners of the passthrough entity take into account the credit would then be determined under the rules applicable to that type of passthrough entity (for example, section 706 for a partnership). Commenters specifically asked how the credit would be allocated by a partnership. This allocation is governed by the rules set forth in § 1.704–1(b)(4)(ii), with appropriate adjustments under section 705.

VIII. Correction of Errors and Liability of Government Entity

Commenters requested clarification that a government entity is liable for tax that the entity was required to withhold under section 3402(t) but did not withhold, unless the entity can demonstrate that the payee has paid its income tax liability. Commenters also requested clarification of the rules applicable to corrections of overwithholding and underwithholding, and guidance on the effect of repayments, underpayments, or overpayments for services or property on the determination of section 3402(t) liability.

A. Corrections of Overwithholding and Underwithholding

Section 3402(t)(3) provides that, for purposes of sections 3403 and 3404 and for purposes of so much of subtitle F (except section 7205) as relates to Chapter 24, Collection of Income Tax at Source, payments to any person for property or services that are subject to withholding are treated as if the payments were wages paid by an employer to an employee. If a government entity fails to withhold the tax imposed by section 3402(t), section 3403 applies to determine the government entity's liability.

Section 3403 provides that the employer is liable for the payment of tax required to be deducted and withheld under Chapter 24, and is not liable to any person for the amount of that payment. Section 31.3403–1 of the Employment Tax Regulations provides that every employer required to deduct and withhold the tax under section 3402 from an employee's wages is liable for the payment of the tax whether or not the employer collects the tax from the employee. If the employer fails to withhold all or part of the amount required to be withheld, and thereafter the employee pays the tax, section 3402(d) provides that the tax will not be collected from the employer. Thus, for purposes of section 3402(t), the government entity generally will be liable if it fails to withhold unless under section 3402(d) it can demonstrate that the contractor reported the amount subject to section 3402(t) withholding on its return and paid the income tax due (which may include payment through an amended return or settlement of an audit).

Pursuant to section 3402(t)(3), the rules for adjustments of overpayments or underpayments of income tax withholding on wages also apply to section 3402(t) withholding. *See* section 6413, § 31.6413(a)–2(c)(1), and § 31.6413(a)–1(b)(1)(i) (repayments and reimbursements to employees of overwithholding, and correction of overpayments of income tax withholding); section 6205 and § 31.6205–1 (corrections of underpayments of income tax withholding). If an error is discovered before a return is filed, the payor must report on the return and pay to the IRS the correct amount of income tax withholding. Corrections of overwithholding or underwithholding of income tax before the return is filed are not adjustments, and a payor that discovers an error before a return is filed but does not report and pay the correct amount of tax to the IRS may not later correct the error through an adjustment.

For purposes of correcting overpayments of income tax withholding, a payor must repay or reimburse the overwithheld income tax to the payee in the same calendar year as the original payment in order to make an adjustment. The payor can then make that adjustment on its return at any time before the period of limitations on credit or refund under section 6511 expires for that calendar year. If the amount of the overwithheld income tax is not repaid or reimbursed to the payee in the same calendar year as the original payment, there is no overpayment to be adjusted; rather the amount withheld will be credited to the payee and subject to a potential tax refund. However, an adjustment may be made to correct an

administrative error (that is, an inaccurate reporting of the amount actually withheld).

For purposes of correcting underpayments of income tax withholding, an adjustment can generally only be made in the same calendar year as the original payment. An exception to this general rule applies to corrections for administrative errors (that is, an inaccurate reporting of the amount actually withheld).

Pursuant to section 3402(t)(3), the rules for claims for refund of income tax withholding on wages also apply to section 3402(t) withholding. *See* section 6414 and § 31.6414–1. Section 6414 permits refunds of income tax withholding only to the extent the amount of the overpayment was not actually deducted and withheld from the payee.

Amounts withheld under section 3402(t) are reported on an annual Form 945.

Accordingly, any corrections of overwithholding or underwithholding during the calendar year are not adjustments; the government entity must report and pay to the IRS the correct amount of tax on Form 945. For example, if a government entity pays an amount subject to section 3402(t) withholding in error to a contractor and the contractor repays the net amount to the government entity within the same calendar year, the government entity should not report the amount and the related withholding on the annual Form 945 (that is, the government entity should report and pay the correct amount of tax on Form 945). Because the correction is made before the return is filed, the correction does not constitute an adjustment. The government entity may reduce its deposit of other withholding reportable on Form 945 for that calendar year to account for the deposit of section 3402(t) withholding on the amount repaid by the contractor. If the contractor repays the government entity an amount in a later calendar year, no adjustment can be made because an adjustment is permitted only in the case of an administrative error (an inaccurate reporting of the amount actually withheld) discovered after the filing of the Form 945. The contractor already received a credit for the amount withheld under the general rules for crediting income tax withholding.

Similarly, the government entity can collect underwithholding only during the same calendar year as the payment (except corrections made in the case of administrative errors). If the underpayment is discovered in a later calendar year, the government entity is liable under section 3403 for any amount that should have been withheld, unless under section 3402(d) it can demonstrate that the contractor reported the amount subject to section 3402(t) withholding on its return and paid the income tax due (which may include payment through an amended return or settlement of an audit). The contractor is liable for any income tax due on any payment subject to withholding regardless of whether the government entity actually withholds any amount from the payment.

B. Application of the $10,000 Threshold to Corrections of Erroneous Payments

The final regulations provide that the $10,000 payment threshold applies to the actual payment made by the government entity, even if the amount of the actual payment is incorrect. For example, if an excessive payment is subject to section 3402(t) withholding, the subsequent repayment of all or a portion of the initial payment does not affect whether the $10,000 threshold was met with respect to the initial payment. Any correction of income tax withholding applies only to the withholding on the amount repaid and not to the remaining portion of the original payment, even if that remaining portion is less than $10,000. Similarly, if the payment was less than $10,000 due to an insufficient payment to the payee, the $10,000 threshold applies separately to the initial payment and the subsequent payment (to make up for the insufficient payment) unless the anti-abuse rule applies (that is, unless the payment was divided into two or more payments primarily to avoid the $10,000 payment threshold).

IX. Extension of Applicability Date and Transition Relief for Existing Contracts

Numerous commenters indicated that an extended period of time following the issuance of final regulations would be necessary for government entities to adopt the systems and processes necessary to comply with the § 3402(t) withholding and related reporting requirements. Noting the necessity to formulate government acquisition rules that are consistent with the final regulations, as well as the infrastructure needed to apply those rules, some commenters stated that government entities would need at least 18 months from the issuance of final regulations under section 3402(t) to be able to comply.

In response to these practical considerations, the final regulations provide that the withholding and reporting requirements under these regulations apply to payments made after December 31, 2012, subject to an existing contract exception. Thus, under the regulations, payments made under written binding contracts in effect on December 31, 2012, are not subject to section 3402(t) withholding, while payments made after December 31, 2012, under contracts entered into after December 31, 2012, are subject to section 3402(t) withholding unless otherwise excepted. In addition, if an existing contract is materially modified after December 31, 2012, the contract ceases to be an existing contract and payments under the contract become subject to section 3402(t) withholding. With respect to payments before January 1, 2013, government entities are not required to apply section 3402(t) withholding and the related reporting, and accordingly will not be subject to any liability, penalties or interest for failure to do so.

Commenters requested that the material modification rule be removed because of the difficulty in determining whether it applies. Commenters anticipated disputes between parties about what constitutes a material modification and questioned how such disputes would be resolved. Certain commenters also requested that a mere contract renewal not be considered a material modification. Some commenters suggested that, in lieu of a material modification rule, withholding should apply to all contracts after a certain effective date, including those that have not been materially modified.

In response to these comments, at the same time that these final regulations are being issued, the IRS and the Treasury Department are proposing regulations to provide that the exception for payments made under existing contracts will not apply to payments made on or after January 1, 2014. See REG–151687–10. Thus, under these proposed regulations, payments on or after January 1, 2014, under all contracts (existing and new) would be subject to withholding under section 3402(t) unless an exception applies.

The final regulations retain the material modification rule but provide that a mere contract renewal will generally not be considered a material modification. For this purpose, a modification is not a material modification unless it materially affects either the payment terms of the contract or the services or property to be provided under the contract. Thus, for example, a change order (meaning a change in the specifications of a contract that the government entity is authorized to make under the contract without the contractor's consent) generally would not be a material

modification unless the change materially affected the price or other payment terms, or the services or property to be provided. The final regulations also provide that modifying a contract to conform to changes in the applicable law is not a material modification.

Several commenters requested guidance on the application of section 3402(t) withholding to payments under Medicare provider agreements. Under the final regulations, Medicare provider agreements in effect as of December 31, 2012, are existing contracts for purposes of the existing contract exception unless materially modified after December 31, 2012. Additionally, renewals of Medicare provider agreements will not be treated as material modifications to the extent the agreement is modified to conform to Federal law. As with other existing contracts, the proposed regulations issued with these final regulations would provide that payments made by government entities on or after January 1, 2014, under both existing and new Medicare provider agreements will be subject to section 3402(t) withholding.

X. Transition Rule for Interest and Penalties on Underpayments

Consistent with the proposed regulations, the final regulations provide a transition rule for payments for property and services made before January 1, 2014. Under this rule, a government entity will not be liable for interest and penalties for failure to withhold on payments for property or services made before January 1, 2014, if the entity made a good faith effort to comply with section 3402(t). However, this rule does not relieve the entity from liability for the amount of tax required to be withheld under section 3402(t).

Effective/Applicability Date

These regulations apply to payments made after December 31, 2012. In addition, the regulations will not apply to payments under a contract existing on December 31, 2012, unless the contract is materially modified after December 31, 2012.

Special Analyses

It has been determined that this Treasury decision is not a significant regulatory action as defined in Executive Order 12866. Therefore, a regulatory assessment is not required. It also has been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to this regulation, and because the regulation does not impose a collection of information on small entities, the Regulatory Flexibility Act (5 U.S.C. chapter 6) does not apply. Pursuant to section 7805(f) of the Internal Revenue Code, the notice of proposed rulemaking preceding this regulation was submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

Drafting Information

The principal author of these final regulations is A. G. Kelley, Office of the Division Counsel/Associate Chief Counsel (Tax Exempt and Government Entities). However, other personnel from the IRS and the Treasury Department participated in their development.

List of Subjects in 26 CFR Part 31

Employment taxes, Fishing vessels, Gambling, Income taxes, Penalties, Pensions, Railroad retirement, Reporting and recordkeeping requirements, Social Security, Unemployment compensation.

Adoption of Amendments to the Regulations

Accordingly, 26 CFR part 31 is amended as follows:

PART 31—EMPLOYMENT TAXES AND COLLECTION OF INCOME TAX AT SOURCE

■ **Paragraph 1.** The authority citation for part 31 continues to read in part as follows:

Authority: 26 U.S.C. 7805 * * *.

■ **Par. 2.** Sections 31.3402(t)–0, 31.3402(t)–1, 31.3402(t)–2, 31.3402(t)–3, 31.3402(t)–4, 31.3402(t)–5, 31.3402(t)–6, and 31.3402(t)–7 are added to read as follows:

§ 31.3402(t)–0 Outline of the Government withholding regulations.

This section lists paragraphs contained in §§ 31.3402(t)–1 through 31.3402(t)–7.

31.3402(t)–1 Withholding requirement on certain payments made by government entities.

(a) In general.
(b) Special rules.
(c) Deposit and reporting requirements.
(d) Effective/applicability date.

31.3402(t)–2 Government entities required to withhold under section 3402(t).

(a) In general.
(b) Government of the United States.
(c) State.
(d) Political Subdivision.
(e) [Reserved].
(f) Possessions of the United States.
(g) Passthrough entities.
(h) Small entity exception.
(i) Effective/applicability date.

31.3402(t)–3 Payments subject to withholding.

(a) In general.
(b) Payment threshold of $10,000.
(c) No withholding on successive payments.
(d) Payments made through a payment administrator or to a contractor.
(e) [Reserved].
(f) Examples.
(g) Effective/applicability date.

31.3402(t)–4 Certain payments excepted from withholding.

(a) Payments subject to withholding under chapter 3 or chapter 24 (other than section 3406).
(b) Payments subject to withholding under section 3406 with backup withholding deducted.
(c) [Reserved].
(d) Payments for real property.
(e) Payments to government entities, tax-exempt organizations, and foreign governments.
(f) Payments made pursuant to a classified or confidential contract.
(g) Exception for political subdivisions or instrumentalities thereof making less than $100,000,000 of payments for property or services annually.
(h) Payments made in connection with a public assistance or public welfare program.
(i) Payments made to any government employee with respect to his or her services.
(j) Payments received by nonresident alien individuals and foreign corporations.
(k) Payments to Indian Tribal governments.
(l) Payments in emergency or disaster situations.
(m) Grants.
(n) Sales tax, excise tax, value-added tax, and other taxes.
(o) Loan guarantees.
(p) Debt.
(q) Investment securities.
(r) Partially exempt payments.
(s) Determination of eligibility for exemption.
(t) Withholding relief for 2012.
(u) Effective/applicability date.

31.3402(t)–5 Application to passthrough entities.

(a) In general.
(b) Definitions.
(c) Payments from a passthrough entity.
(d) Payments to a passthrough entity.
(e) Effective/applicability date.

31.3402(t)–6 Crediting of tax withheld under section 3402(t).

(a) Crediting against income tax liability only.
(b) Taxable year of credit.
(c) Estimated tax.
(d) Effective/applicability date.

31.3402(t)–7 Transition relief from interest and penalties.

(a) Good faith exception for interest and penalties on payments before January 1, 2014.
(b) Effective/applicability date.

§ 31.3402(t)–1 Withholding requirement on certain payments made by government entities.

(a) *In general.* Except as provided in §§ 31.3402(t)–3(b) and 31.3402(t)–4, the Government of the United States, every State, every political subdivision thereof, and every instrumentality of the foregoing (including multi-State agencies) making any payment to any person providing any property or services must deduct and withhold from the payment a tax in an amount equal to 3 percent of such payment.

(b) *Special rules.* See § 31.3402(t)–2 for government entities required to withhold under this section, § 31.3402(t)–3 for what constitutes a payment to a person for property or services and when such payment is deemed to occur for purposes of this section, and § 31.3402(t)–4 for payments that are excepted from withholding under this section.

(c) *Deposit and reporting requirements.* See § 31.6302–4 for deposit requirements with respect to withholding under section 3402(t). See §§ 31.6011(a)–4(b) and 31.6051–5 for the reporting requirements with respect to withholding under section 3402(t).

(d) *Effective/applicability date.* (1) Except as provided in paragraph (d)(2) of this section, this section applies to payments by the Government of the United States, every State, every political subdivision thereof, and every instrumentality of the foregoing (including multi-State agencies) to any person providing property or services made after December 31, 2012.

(2) Payments made under a written binding contract that was in effect on December 31, 2012, are not subject to the withholding requirements of this section. The preceding sentence does not apply to payments made under any contract that is materially modified after December 31, 2012. For this purpose, a material modification includes only a modification that materially affects the property or services to be provided under the contract, the terms of payment for the property or services under the contract, or the amount payable for the property or services under the contract. Notwithstanding the foregoing, a material modification does not include a mere renewal of a contract that does not otherwise materially affect the property or services to be provided under the contract, the terms of payment for the property or services under the contract, or the amount payable for the property or services under the contract. A material modification also does not include a modification to the contract to the extent required by applicable Federal, State or local law.

§ 31.3402(t)–2 Government entities required to withhold under section 3402(t).

(a) *In general.* The requirement to withhold under section 3402(t) and § 31.3402(t)–1(a) applies to the Government of the United States (see paragraph (b) of this section) and every State (see paragraph (c) of this section), as well as instrumentalities of the foregoing. The requirement also applies to political subdivisions of every State (see paragraph (d) of this section) and their instrumentalities, unless the small entity exception of § 31.3402(t)–4(g) applies.

(b) *Government of the United States.* The Government of the United States includes the legislative branch, the judicial branch, and the executive branch, and all components of the United States Government. Thus, departments and agencies are included within the definition of United States Government.

(c) *State.* The term *State* includes the District of Columbia. However, an Indian Tribal government is not considered a State for purposes of section 3402(t) and § 31.3402(t)–1(a). See section 7871(a).

(d) *Political subdivision.* The term *political subdivision* for purposes of section 3402(t) and § 31.3402(t)–1(a) is defined as a political subdivision within the meaning of § 1.103–1(b) of this chapter, except that a subdivision of an Indian Tribal government is not considered a political subdivision. See section 7871(a) and (d).

(e) [Reserved].

(f) *Possessions of the United States.* For purposes of section 3402(t) and § 31.3402(t)–1(a), the government of a possession or territory of the United States is not treated as a government entity subject to the withholding requirements of section 3402(t)(1).

(g) *Passthrough entities.* See § 31.3402(t)–5(c) for the treatment of payments from certain passthrough entities as subject to the withholding requirements of § 31.3402(t)–1.

(h) *Small entity exception.* See § 31.3402(t)–4(g) for the exception from the withholding requirements of § 31.3402(t)–1 for political subdivisions and instrumentalities thereof making less than $100,000,000 of payments for property or services annually.

(i) *Effective/applicability date.* This section applies to amounts paid on or after January 1, 2013.

§ 31.3402(t)–3 Payments subject to withholding.

(a) *In general.* A payment is subject to withholding for purposes of §§ 31.3402(t)–1 through 31.3402(t)–7 when paid by a government entity to any person, as defined in § 301.7701–6(a) of this chapter, for property or services. If, however, the government entity uses a payment administrator to pay a person for property or services, payment occurs when the payment administrator pays such person. The government entity subject to the withholding requirements of § 31.3402(t)–1 is liable for the withholding required and responsible for all related reporting regardless of whether the government entity or its payment administrator makes the payment for property or services. For this purpose, if a government entity makes an advance payment, interim payment, financing payment, or similar payment, the amount is treated as paid by the government entity at the time the funds are disbursed, regardless of whether the government entity has received or accepted the property or services at that time.

(b) *Payment threshold of $10,000*—(1) *In general.* The term *payment threshold* means an amount equal to $10,000. The withholding requirements of § 31.3402(t)–1 will not apply to any payment that is less than the payment threshold. Whether a payment is equal to or in excess of the payment threshold is determined when the payment is made. Thus, the payment threshold applies to the actual payment even if the amount of the actual payment is incorrect (except to the extent the anti-abuse rule in paragraph (b)(3) of this section applies). A later determination that the amount of the payment was in error does not affect the application of the payment threshold (except to the extent the anti-abuse rule in paragraph (b)(3) of this section applies), so that the payment threshold applies to the erroneous payment when made, and separately to any additional payment intended to correct an erroneous underpayment.

(2) *Payment threshold applied per payment.* If a government entity makes a single payment to a person for property or services combining charges for more than one transaction with the person, the determination of whether the payment threshold provided by paragraph (b)(1) of this section is met is based on the amount of the single payment, rather than the amount attributable to each separate transaction. Thus, if a government entity makes a single payment of $10,000 or more to a person, the government entity is required to withhold on the payment, even if the payment is for more than one property or service. The same rule applies if a government entity enters

into multiple transactions with a single person, each of which would result in a payment of less than $10,000 if paid separately, but elects to make a single payment covering all the transactions such that the aggregated payment is $10,000 or more. Under these circumstances, the government entity is required to withhold on the aggregated payment.

(3) *Anti-abuse rule.* If a government entity or payment administrator divides a payment or payments to any person for property or services into two or more payments (or permits a person providing property or services to divide a request for payment into two or more requests for payments) primarily to avoid the $10,000 payment threshold provided in paragraph (b)(1) of this section on one or more of these payments, the divided payments will be treated as a single payment made on the date that the first of these payments is made. This rule will not apply to a government entity or payment administrator that makes a payment in accordance with the contractual terms, including any requests for payments submitted by the person providing property or services in compliance with the contractual terms, unless it knows, or has reason to know, that the contractual terms regarding payments were adopted, or the person providing property or services implemented such contractual terms, with the primary purpose of avoiding the $10,000 payment threshold. In determining whether this paragraph (b)(3) applies, a significant factor is whether the government entity or payment administrator has exhibited a pattern or practice of dividing payments to avoid the $10,000 payment threshold.

(4) *Withholding on excepted payments.* A government entity and a person providing property or services to that government entity may agree in writing that the government entity will or may apply section 3402(t) withholding to payments not subject to section 3402(t) withholding, or an identified portion of payments not subject to section 3402(t) withholding (for example, only such payments made from a specified agency of the government entity), including payments below the payment threshold provided in paragraph (b)(1) of this section. This paragraph (b)(4) does not apply to government entity payments that are subject to section 3402(t) withholding notwithstanding a contractual provision between the parties.

(c) *No withholding on successive payments.* If a government entity or its payment administrator makes a payment that is subject to the withholding requirements of § 31.3402(t)–1 to a person, no subsequent transfer of cash or property from that payment by such person to another person is treated as a payment subject to withholding for purposes of §§ 31.3402(t)–1 through 31.3402(t)–7.

(d) *Payments made through a payment administrator or to a contractor*—(1) *Definition.* The following rules apply for purposes of this section:

(i) A *payment administrator* is any person that acts with respect to a payment solely as an agent for a government entity by making the payment on behalf of the government entity to a person providing property or services to, or on behalf of, the government entity.

(ii) A payment administrator is treated as a person providing property or services for purposes of the withholding requirements of section 3402(t) to the extent it receives a fee from the government entity for its services as a payment administrator for the government entity.

(2) *Payments to a contractor.* If a person provides property or services to a government entity under a contract and is not a payment administrator, the person, who is in privity with the government entity, is treated as the person providing property or services subject to withholding under section 3402(t) for all payments received from the government entity, regardless of whether some payments the person receives relate to invoices for property or services provided by subcontractors.

(3) *Application of payment threshold.* Where a government entity uses a payment administrator to make a payment, the determination of whether the payment meets the payment threshold is made at the time the payment administrator makes the payment to the person providing property or services. If a government entity makes one transfer of funds to a payment administrator that is composed of a fee to compensate the payment administrator for its services and other funds that are to be paid to persons providing property or services, the determination of whether the payment threshold is met on the portion that is the fee is made at the time of the transfer of the funds to the payment administrator.

(e) [Reserved].

(f) *Examples.* This section is illustrated by the following examples:

Example 1. (i) Prime contractor *X* has a contract with a government entity to provide services and property to the government entity. *X* contracts with numerous subcontractors to provide services and property in connection with the contract. While the engagement of any particular subcontractor is subject to approval by the government entity, the subcontractors are not parties to the contract between *X* and the government entity, and the government entity is not a party to the contracts between *X* and subcontractors. Under its contract with the government entity, *X* submits an invoice for $48,000 for providing services and property to the government entity, including charges for services and property provided by two subcontractors, *M* and *N.* The invoice reflects charges of $16,000 for *M* and $2,000 for *N.* The government entity pays *X* the entire amount of the invoice in one payment of $48,000. *X* pays *M* for *M*'s billed portion of the invoice in a single payment of $16,000, and *X* pays *N* for *N*'s billed portion of the invoice in a single payment of $2,000.

(ii) Under the facts of this *Example 1, X* is the person providing property or services to, or for the benefit of, the government entity with respect to the entire amount of the $48,000 payment under the invoice, including the charges for services or property provided by its subcontractors *M* and *N. X* is not a payment administrator (as defined in paragraph (d)(1)(i) of this section) because *X* is not making payments solely as an agent of the government entity to persons providing property or services. Instead, *X* makes payments to subcontractors *M* and *N* pursuant to *X*'s separate contracts with these subcontractors to which the government entity is not a party. Therefore, under paragraphs (a) and (d)(2) of this section, the entire amount of the $48,000 payment to *X* under the invoice, including the charges for services and property provided by its subcontractors *M* and *N,* is the payment subject to withholding for purposes of section 3402(t).

(iii) Under paragraph (b)(1) of this section, the determination whether the payment meets the payment threshold is based on the entire amount of the payment from the government entity to *X.* Withholding under section 3402(t) applies to the government entity's $48,000 payment to *X* because the payment meets the payment threshold and is not otherwise excepted from section 3402(t) withholding. Thus, the payment is subject to withholding of 3 percent, or $1440.

(iv) Payments made by *X* to the subcontractors, *M* and *N,* are not payments by the government entity or its payment administrator. Thus, *X*'s $16,000 payment to *M* and *X*'s $2,000 payment to *N* for services or property under the contract are not subject to withholding under section 3402(t). See paragraphs (c) and (d)(2) of this section.

(v) The government entity is liable for the $1440 withholding required under section 3402(t) on its payment to *X* and is responsible for the related reporting required under § 31.6051–5. See paragraph (a) of this section. *X* is the person receiving the payment for purposes of reporting under § 31.6051–5. Thus, the government entity is responsible for furnishing *X* with a Form 1099–MISC, "Miscellaneous Income" (or successor form), including the entire amount of the payment ($48,000) and the entire amount of the withholding ($1440) and filing a Form 1099–MISC with the Internal Revenue Service.

Example 2. (i) *Z* has a contract with a government entity to make payments as an agent of the government entity to persons providing services or property to, or on behalf of, the government entity. The only services *Z* provides under the contract are its services in acting as an agent for the government entity in making payments to persons providing property or services to, or on behalf of, the government. The government entity transfers funds of $71,000 to *Z,* which includes a fee of $1,000 to *Z* for its services as an agent under the contract. *Z* then makes payments of the $70,000 remainder of the funds to persons providing property or services to, or on behalf of, the government entity, including a single payment of $18,000 to *P* and a single payment of $7,000 to *R.*

(ii) Under the facts of this *Example 2, Z* is a payment administrator (as defined in paragraph (d)(1)(i) of this section) because *Z* makes payments solely as an agent for the government entity to persons providing property or services to, or on behalf of, the government entity. Under paragraphs (a) and (d) of this section, *Z* is not treated as a person providing property or services with respect to $70,000 of the transfer of funds (the amount of the funds to be paid to persons providing property or services to, or on behalf of, the government entity). Because *Z* is not treated as a person providing property or services with respect to this $70,000 portion of the funds, this portion of the transfer of funds by the government entity to *Z* is not subject to withholding under section 3402(t) when transferred to *Z.*

(iii) Under paragraph (d)(1)(ii) of this section, the payment administrator is treated as a person providing property or services with respect to the portion of the $71,000 fund transfer that is a fee for its services as a payment administrator, or $1,000. Under paragraph (d)(3) of this section, the determination of whether the payment threshold is met with respect to the fee portion of the payment from the government entity to *Z* at the time of the payment from the government entity to *Z* is made. Because the $1,000 fee portion of the payment falls beneath the $10,000 payment threshold, withholding under section 3402(t) is not required with respect to that portion of the payment.

(iv) *P* and *R* are persons providing services or property to, or on behalf of, the government entity with respect to the payments they receive from *Z.*

(v) Withholding is required under section 3402(t) on the payment by *Z,* a payment administrator, to a person providing property or services to, or on behalf of, a government entity provided the payment meets the payment threshold and is not otherwise excepted. Under paragraph (d)(3) of this section, the determination of whether the payment threshold is met on the payment *Z* makes to a person providing property or services is made at the time *Z* pays the person providing property or services. Under the facts of this *Example 2, Z*'s payment to *P* of $18,000 meets the payment threshold, and therefore withholding of $540 under section 3402(t) applies. *Z*'s payment to *R* of $7,000 does not meet the payment threshold, and therefore, no withholding under section 3402(t) is required.

(vi) The government entity, not *Z,* is liable for any withholding required under section 3402(t) on the payments from *Z* to persons providing property or services. Also, the government entity, not *Z,* is responsible for any reporting required under § 31.6051–5 on the payment from *Z* to persons providing property or services. See paragraph (a) of this section. Each person providing property or services for which withholding is required, not *Z,* is the person receiving the payment for purposes of the reporting required under § 31.6051–5 if withholding under section 3402(t) applies. Thus, the government entity is responsible for furnishing *P* Form 1099–MISC reflecting the amount of the payment from *Z* to *P* of $18,000 and the amount of withholding of $540 and filing a Form 1099–MISC with the Internal Revenue Service.

Example 3. (i) On March 1, 2013, a government entity makes a payment of $12,000 to *Y* for providing property or services. The payment for property or services is not excepted from withholding under § 31.3402(t)–4. On March 20, 2013, it is determined that the payment should have been $9,000, and therefore, *Y* owes the government entity $3,000 to repay the excess payment.

(ii) The facts are the same as in paragraph (i) of this *Example 3,* except that, in addition, on April 30, 2013, the government entity makes a net payment of $6,000 to *Y* for providing property or services, which is based on the payment of a bill for property or services equal to $11,000, which is offset by the repayment of the $3,000 debt that *Y* owes with respect to the erroneous March 1, 2013, payment, and the repayment of a $2,000 unrelated debt to the Federal Government. No exception from withholding under § 31.3402(t)–4 applies to the $11,000 amount.

(iii) The facts are the same as in paragraph (ii) of this *Example 3,* except that, in addition, on May 31, 2013, the government entity makes a single payment of $14,000 to *Y* that consists of a $9,000 portion that is subject to section 3402(t) withholding (without regard to the payment threshold) and a $5,000 portion that is excepted from section 3402(t) withholding under § 31.3402(t)–4.

(iv) Under the facts of paragraph (i) of this *Example 3,* the payment on March 1, 2013, is subject to withholding under section 3402(t) because it meets the payment threshold under paragraph (d) of this section. The government entity is liable for withholding section 3402(t) tax on the payment equal to 3% of $12,000, or $360. The subsequent determination on March 20, 2013, that an incorrect amount was paid to *Y* does not affect the application of the $10,000 payment threshold to the payment on March 1, 2013. If there were no additional payments or repayments between the government entity and *Y* during 2013, and if the government entity correctly withheld $360 under section 3402(t), the government entity would issue *Y* a 2013 Form 1099–MISC (or successor form) reporting $12,000 of payments subject to section 3402(t) withholding and $360 of withholding.

(v) Under the facts of paragraph (ii) of this *Example 3,* the payment on April 30, 2013, is also subject to withholding under section 3402(t). As an initial matter, the government entity calculates its liability for withholding section 3402(t) on the payment equal to 3% of $11,000, or $330, because the amount of the payment for purposes of section 3402(t) and the payment threshold is not reduced by the amount of offsets for debts owed the government. Thus, the payment exceeds the payment threshold under paragraph (d) of this section. However, the repayment within the same calendar year of the $3,000 excess amount which was paid on March 1, 2013, means that the government is entitled to correct its income tax withholding liability with respect to *Y* by the amount of section 3402(t) withholding paid with respect to the $3,000, or $90. Thus the net withholding amount deducted from the $6,000 net payment is $240. The offset of $2,000 for other unrelated debt owed the Federal Government has no effect on section 3402(t) liability. Neither the offset for the $3,000 repayment nor the offset for the $2,000 other debt affects the application of the payment threshold to the March 1, 2013, payment or the April 30, 2013, payment. If there were no additional payments or repayments between the government entity and *Y* during 2013, and if the government entity withheld properly, the government entity would be required to furnish *Y* a Form 1099–MISC (or successor form) reporting $20,000 of payments subject to section 3402(t) withholding ($12,000 plus $11,000 less $3,000 repayment) and $600 withholding ($360 plus $330 less $90) and to file a Form 1099–MISC with the Internal Revenue Service.

(vi) Under the facts of this paragraph (iii) of this *Example 3,* the government entity is not required to withhold on the payment because only $9,000 of the payment is potentially subject to section 3402(t) withholding and this amount does not meet the payment threshold. However, under the optional rule of § 31.3402(t)–4(r), because only a portion of the payment is exempt from section 3402(t) withholding, the government entity may treat the entire amount of the payment as subject to section 3402(t) withholding provided the payee has agreed to this withholding. If the government entity applies the optional rule of § 31.3402(t)–4(r), the payment threshold would be met and the government entity would withhold under section 3402(t) the amount of $420, or 3% of the $14,000 payment. If the government entity treats the entire amount of the payment as subject to section 3402(t) withholding and withholds, the entire amount of the payment ($14,000) plus the $420 withholding would be reported on Form 1099–MISC (or successor form).

(g) *Effective/applicability date.* This section applies to payments by the Government of the United States, every State, every political subdivision thereof, and every instrumentality of the foregoing (including multi-State agencies) to any person providing property or services made after December 31, 2012.

§ 31.3402(t)–4 Certain payments excepted from withholding.

(a) *Payments subject to withholding under chapter 3 or chapter 24 (other than section 3406)*—(1) *In general.* Payments are excepted from withholding under section § 31.3402(t)–1(a) if they are subject to withholding under chapter 3 of the Internal Revenue Code (Code) or under sections 3401 through 3405 (other than section 3402(t)).

(2) *Payments subject to withholding under chapter 3.* Payments subject to withholding under chapter 3 of the Code include those payments that are subject to, but exempt from, withholding under chapter 3 of the Code on the ground that the payments are exempt from United States income tax pursuant to an income tax convention to which the United States is a party.

(3) *Payments subject to withholding at election of payee.* For purposes of this exception from section 3402(t), payments for which the payee may elect withholding are exempt from withholding under § 31.3402(t)–1(a) regardless of whether the payee in fact makes such an election. These payments include—

(i) Unemployment compensation as defined in section 85(b) (see section 3402(p)(2));

(ii) Social security benefits as defined in section 86(d) (see section 3402(p)(1)(C)(i));

(iii) Any payment referred to in the second sentence of section 451(d) that is treated as insurance proceeds, relating to certain disaster payments received under the Agricultural Act of 1949, as amended, or Title II of the Disaster Assistance Act of 1988 (see section 3402(p)(1)(C)(ii));

(iv) Any amount that is includible in gross income under section 77(a), relating to amounts received as loans from the Commodity Credit Corporation that the taxpayer has elected to treat as income (see section 3402(p)(1)(C)(iii)); and

(v) Any payment of an annuity to an individual.

(b) *Payments subject to withholding under section 3406 with backup withholding deducted.* A payment is not subject to withholding under section 3402(t) if the payment is subject to withholding under section 3406, relating to backup withholding, and if backup withholding is actually being withheld from such payment.

(c) [Reserved].

(d) *Payments for real property.* Payments for real property are not subject to the withholding requirements of § 31.3402(t)–1. For purposes of this exception, the term *payments for real property* includes the purchase and the leasing of real property (including payments made by a lessee to a lessor related to the use or occupancy of the leased property and made in accordance with the terms of the applicable lease, but not including either a payment for construction, or payment to a person other than the lessor, even if related to the use or occupancy of the leased property and required by the terms of the lease). However, payments for the construction of buildings or other public works projects, such as bridges or roads, are not payments for real property.

(e) *Payments to government entities, tax-exempt organizations, and foreign governments*—(1) *Government entities.* Payments are not subject to withholding under section 3402(t) if the payments are made to government entities that are subject to the withholding requirements of section 3402(t)(1) pursuant to § 31.3402(t)–2. For purposes of this exception, payments to government entities that qualify for the exception for political subdivisions and instrumentalities making less than $100,000,000 of payments for property and services annually, as provided by section 3402(t)(2)(G) and paragraph (g) of this section, are treated as payments to government entities that are subject to the withholding requirements of section 3402(t)(1).

(2) *Tax-exempt organizations.* Payments to an organization that is exempt from taxation under section 501(a) as an organization described in section 501(c), 501(d), or 401(a) are not subject to withholding under section 3402(t).

(3) *Foreign governments.* Payments to foreign governments are not subject to withholding under section 3402(t). For purposes of this paragraph (e), a government of a possession or territory of the United States is treated as a foreign government.

(f) *Payments made pursuant to a classified or confidential contract.* Payments made pursuant to a classified or confidential contract described in section 6050M(e)(3) are not subject to withholding under section 3402(t).

(g) *Exception for political subdivisions or instrumentalities thereof making less than $100,000,000 of payments for property or services annually*—(1) *In general.* Section 3402(t) withholding is not required on payments made by a political subdivision of a State (or any instrumentality of a political subdivision of a State) that makes less than $100,000,000 of payments for property or services annually.

(2) *Determination of whether an entity is a political subdivision of a State.* Whether an entity is a political subdivision of a State for purposes of paragraph (g)(1) of this section is determined under § 31.3402(t)–2(d).

(3) *Determination of whether a political subdivision or instrumentality makes less than $100,000,000 of payments for property or services annually*—(i) *General determination rule.* In general, whether a political subdivision or instrumentality makes less than $100,000,000 of payments for property or services annually for purposes of paragraph (g)(1) of this section is determined for each calendar year based on the total payments made by the entity for property or services in the entity's accounting year ending with or within the second preceding calendar year. For this purpose, payments that qualify for the exceptions from withholding under § 31.3402(t)–4(a) through (q) (or would have qualified had these regulations been in effect) are not included in determining total payments made. However, payments that are not subject to withholding because the payments are less than the $10,000 payment threshold described in § 31.3402(t)–3(b), or based on the applicability date rules or transition rules contained in § 31.3402(t)–1(d), § 31.3402(t)–2(i), § 31.3402(t)–3(g), § 31.3402(t)–4(u), or § 31.3402(t)–5(e), or based on the withholding relief for 2012 provided in § 31.3402(t)–4(t), but are not otherwise excepted, are included in determining total payments. For this purpose, the accounting year refers to the fiscal year (consisting of 12 months) or calendar year used by the government entity in setting its budgets and keeping its accounting books. If a political subdivision or instrumentality was not in existence in the second preceding calendar year or if no 12-month accounting year exists ending in the second preceding calendar year, eligibility for this exception is determined based on the total projected payments for the accounting year consisting of 12 months ending in that calendar year.

(ii) *Optional determination rule.* A political subdivision of a state or an instrumentality of that political subdivision may treat itself as eligible for the exception provided in paragraph (g)(1) of this section for a calendar year if the average of the total payments calculated under the rules of paragraph (g)(3)(i) of this section for four of the five successive accounting years, the fifth year of which is the entity's determination year, is less than $100,000,000. For this purpose, for a calendar year the political subdivision's

or instrumentality's determination year is the accounting year ending with or within the second preceding calendar year. If a political subdivision or instrumentality withholds and pays (or deposits) tax under section 3402(t) for a calendar year and files a return reporting the withheld tax under section 3402(t) for that calendar year based on the general determination rule of paragraph (g)(3)(i) of this section, it is deemed to have waived any right to use the optional determination rule of this paragraph (g)(3)(ii) of this section for that calendar year.

(4) *Examples.* The following examples illustrate the provisions of paragraph (g) of this section:

Example 1. (i) Government entity *X,* which qualifies as a political subdivision or instrumentality of a political subdivision for calendar years 2013 and 2014, uses a fiscal year ending June 30 to determine its budgets and to keep its accounting books. During its fiscal year ending June 30, 2011, *X* made payments to persons for property and services of $200,000,000, including $102,000,000 of payments that would have been excepted under § 31.3402(t)–4(a) through (q) if section 3402(t) had been in effect.

(ii) During its fiscal year ending June 30, 2012, *X* made payments for property and services of $210,000,000, including $106,000,000 that would have been excepted under § 31.3402(t)–4(a) through (q) if section 3402(t) had been in effect. The payments *X* made for property or services during the fiscal year ending June 30, 2012, included $15,000,000 of payments below the $10,000 payment threshold described in § 31.3402(t)–3(b).

(iii) For the calendar year 2013, the general determination rule of paragraph (g)(3)(i) of this section applies to determine whether *X* is eligible for the exception provided in paragraph (g)(1) of this section based on the total payments *X* made for its accounting year ending June 30, 2011. Because total payments for this purpose exclude payments that would be excepted under § 31.3402(t)–4(a) through (q), total payments were $200,000,000 less $102,000,000, or $98,000,000. Therefore, for calendar year 2013, *X* would be eligible for the exception provided in paragraph (g)(1) of this section, and would not be required to withhold under section 3402(t).

(iv) For the calendar year 2014, the general determination rule of paragraph (g)(3)(i) of this section applies to determine whether *X* is eligible for the exception provided in paragraph (g)(1) of this section based on the total payments it made for its accounting year ending June 30, 2012. Because total payments for this purpose exclude payments that would have been excepted under § 31.3402(t)–4(a) through (q), but include payments below the $10,000 payment threshold described in § 31.3402(t)–3(b), total payments were $210,000,000 less $106,000,000, or $104,000,000. Therefore, for calendar year 2014, *X* would not qualify for the exception provided in paragraph (g)(1) of this section and would be required to withhold under section 3402(t), provided it is not eligible for or does not use the exception under the optional determination rule provided in paragraph (g)(3)(ii) of this section.

Example 2. (i) Government entity *Y,* which qualifies as a political subdivision or instrumentality of a political subdivision for calendar years 2013 and 2014, uses a fiscal year ending June 30 to determine its budgets and to keep its accounting books. During its fiscal year ending June 30, 2007, *Y* made payments to persons for property and services of $195,000,000, including $110,000,000 of payments that would have been excepted under § 31.3402(t)–4(a) through (q) if section 3402(t) had been in effect.

(ii) During its fiscal year ending June 30, 2008, *Y* made payments to persons for property and services of $204,000,000, including $115,000,000 of payments that would have been excepted under § 31.3402(t)–4(a) through (q) if section 3402(t) had been in effect.

(iii) During its fiscal year ending June 30, 2009, *Y* made payments to persons for property and services of $215,000,000, including $124,000,000 of payments that would have been excepted under § 31.3402(t)–4(a) through (q) if section 3402(t) had been in effect.

(iv) During its fiscal year ending June 30, 2010, *Y* made payments to persons for property and services of $225,000,000, including $130,000,000 of payments that would have been excepted under § 31.3402(t)–4(a) through (q) if section 3402(t) had been in effect.

(v) During its fiscal year ending June 30, 2011, *Y* made payments to persons for property and services of $275,000,000, including $135,000,000 of payments that would have been excepted under § 31.3402(t)–4(a) through (q) if section 3402(t) had been in effect.

(vi) During its fiscal year ending June 30, 2012, *Y* made payments for property and services of $235,000,000, including $140,000,000 that would have been excepted under § 31.3402(t)–4(a) through (q) if section 3402(t) had been in effect.

(vii) For the calendar year 2013, the general determination rule of paragraph (g)(3)(i) of this section applies to determine whether *Y* is eligible for the exception provided in paragraph (g)(1) of this section based on the total payments *Y* made for its accounting year ending June 30, 2011. Because total payments for this purpose exclude payments that would be excepted under § 31.3402(t)–4(a) through (q), total payments were $275,000,000 less $135,000,000, or $140,000,000. Therefore, for calendar year 2013, *Y* would not qualify for the exception provided in paragraph (g)(1) of this section and would be required to withhold under section 3402(t), unless it was eligible for, and used, the optional determination rule provided in paragraph (g)(3)(ii) of this section.

(viii) For the calendar year 2013, under the optional determination rule of paragraph (g)(3)(ii) of this section, *Y* would have total payments for this purpose in the accounting year ending June 30, 2007, of $85,000,000; in the accounting year ending June 30, 2008, of $89,000,000; in the accounting year ending June 30, 2009, of $91,000,000; in the accounting year ending June 30, 2010, of $95,000,000; and in the accounting year ending June 30, 2011, of $140,000,000. The average of four of those years (excluding the highest year of $140,000,000) would be $90,000,000 (85,000,000 plus 89,000,000 plus 91,000,000 plus 95,000,000 equals 360,000,000; 360,000,000 divided by 4 equals 90,000,000). Thus, for the calendar year 2013, under the optional determination rule of paragraph (g)(3)(ii) of this section, *Y* is eligible for the exception provided in paragraph (g)(1) of this section and is not required to withhold under section 3402(t). Alternatively, *Y* could apply the general determination rule, ignore the optional determination rule, and withhold under section 3402(t).

(ix) For the calendar year 2014, under the general determination rule of paragraph (g)(3)(i) of this section, *Y* has total payments of $95,000,000. Thus, *Y* is eligible for the exception provided in paragraph (g)(1) of this section and is not required to withhold under section 3402(t).

(h) *Payments made in connection with a public assistance or public welfare program*—(1) *In general.* Section 3402(t) withholding does not apply to payments made in connection with a public assistance or public welfare program for which eligibility is determined by a needs or income test.

(2) *Needs or income test.* Eligibility for a public assistance or public welfare program is not considered to be determined by a needs or income test if eligibility for the program is based solely on the age of the beneficiary. A public assistance program providing disaster relief to victims of a natural or other disaster is considered to be a program for which eligibility is determined under a needs test. Payments under government programs to provide health care or other services that are not based on the needs or income of the recipient are subject to section 3402(t) withholding, including programs where eligibility is based on the age of the beneficiary.

(3) *Payments to third parties.* The exception provided by this paragraph (h) also applies to payments made to third parties to provide benefits to beneficiaries under a public assistance or public welfare program for which eligibility is determined by a needs or income test.

(4) *Allocation of payments.* If only a portion of a payment is made in connection with a public assistance or public welfare program for which eligibility is determined by a needs or income test, the portion that is made in connection with the program and therefore is not subject to section 3402(t)

withholding may be determined using any reasonable allocation method. If the government entity makes a reasonable, good faith determination that either the excludable or the nonexcludable portion is insignificant in comparison to the entire payment, the insignificant portion may be disregarded for purposes of this paragraph (h) (so that the entire payment is either eligible or ineligible for the exception provided by this paragraph (h)).

(i) *Payments made to any government employee with respect to his or her services.* Section 3402(t) withholding does not apply to payments made to any government employee with respect to his or her services as an employee of the government. This exception applies to contributions to deferred compensation plans on behalf of an employee, contributions to employee benefit plans on behalf of an employee, fringe benefits provided to employees, and payments to employees under accountable plans for expenses incurred by the employee for the employee's travel while on government business. This exception also applies to payments made by the government employee under accountable plans (as defined in § 1.62–2(c)(2) of this chapter) to providers of the employee's travel, meals, and lodging when the government employee is traveling on government business.

(j) *Payments received by nonresident alien individuals and foreign corporations.* Section 3402(t) withholding does not apply to any payment received by a nonresident alien individual or foreign corporation for providing services or property if the payment is derived from sources outside the United States, as determined under sections 861, 862, 863, and 865, and is not effectively connected with the conduct of a trade or business within the United States by the nonresident alien individual or foreign corporation.

(k) *Payments to Indian Tribal governments.* Section 3402(t) withholding does not apply to any payment made to an Indian Tribal government or its political subdivisions.

(l) *Payments in emergency, disaster, or hardship situations.* The Internal Revenue Service may provide by publication in the Internal Revenue Bulletin (see § 601.601(d)(2)(ii)(*b*) of this chapter) for additional exceptions from section 3402(t) withholding for certain payments made in an emergency, disaster, or hardship situation if the Internal Revenue Service determines that withholding from the payments would impede a government entity's efforts to respond to the emergency, disaster, or hardship.

(m) *Grants*—(1) *In general.* Section 3402(t) withholding does not apply to any grant as defined in paragraph (m)(2) of this section. This exclusion does not apply to the use by a government entity of the proceeds of a grant received by that government entity (unless the government entity uses the proceeds to make a grant).

(2) *Definition of grant.* For purposes of this paragraph (m), a grant is a transfer of funds by a government entity to a recipient (which may be a state government, local government, or other recipient) pursuant to an agreement reflecting a relationship between the government entity and the recipient when the principal purpose of the relationship is to transfer a thing of value to the recipient to carry out a public purpose of support or stimulation authorized by law instead of acquiring (by purchase, lease, or barter) property or services for the direct benefit or use of the government entity, and substantial involvement is not expected between the government entity and the recipient when carrying out the activity contemplated in the agreement.

(n) *Sales tax, excise tax, value-added tax, and other taxes.* For purposes of this section, section 3402(t) withholding applies to any payment of sales tax, excise tax, value-added tax, or other tax made as part of a payment to any person providing property or services. Notwithstanding the foregoing, the payment of sales tax, excise tax, value-added tax, or other tax may be excluded from section 3402(t) withholding, provided this exclusion is applied consistently to all payments to a given payee during the calendar year.

(o) *Loan guarantees.* Section 3402(t) withholding does not apply to a loan guarantee or the payment of principal and interest on a loan pursuant to a loan guarantee. However, if a government entity (through a right of subrogation or similar right) assumes the operation of a project or activity funded by the loan, section 3402(t) withholding applies to payments by the government entity for property or services relating to the project or activity unless otherwise excepted under this section.

(p) *Debt.* Section 3402(t) withholding does not apply to payment of principal on a loan. However, if a government entity issues a debt obligation to a person providing services as all or part of the purchase price, the debt obligation's fair market value is subject to section 3402(t) withholding, unless an exception applies. If a government entity issues a debt obligation to a person providing property as all or part of the purchase price, the debt obligation's issue price as determined under section 1273 or section 1274, whichever is applicable to the debt obligation, is subject to section 3402(t) withholding, unless an exception applies. In lieu of the issue price, the government entity and the person providing property may agree to treat the stated principal amount of the debt obligation as the payment amount attributable to the debt obligation that is subject to section 3402(t) withholding. If a government entity uses a third party debt obligation (a debt obligation issued by any entity other than that government entity) to pay for property or services, the fair market value of the debt obligation is subject to section 3402(t) withholding, unless an exception applies.

(q) *Investment securities.* Section 3402(t) withholding does not apply to any payments to purchase stock, bonds, or other securities primarily for investment purposes.

(r) *Partially exempt payments.* If a payment includes both an amount subject to section 3402(t) withholding and an amount that is not subject to section 3402(t) withholding, section 3402(t) withholding applies only to the relevant portion of the payment. Notwithstanding the foregoing, a government entity may apply section 3402(t) withholding to the entire payment provided the payee has agreed to this withholding.

(s) *Authorization for additional rules and procedures on payees and payments exempt from section 3402(t) withholding.* The Commissioner is authorized to provide rules and procedures concerning payments that are exempt from withholding, including the classification of additional types of payees or payments as exempt from section 3402(t) withholding, and procedures under which a government entity may determine the eligibility of a payee for an exemption from section 3402(t) withholding (and may rely on this determination notwithstanding the payee's eligibility for this exemption), in revenue procedures, notices, or other guidance published in the Internal Revenue Bulletin (see § 601.601(2) of this chapter).

(t) *Withholding relief for 2012.* Withholding under section 3402(t) is not required with respect to payments made before January 1, 2013. Any person that deducts and withholds tax under section 3402(t) from payments made in 2012 shall deposit and report such tax withheld pursuant to § 31.6302–4 and § 31.6011(a)–4(b), and include the payment and the amount withheld on Form 1099–MISC, "Miscellaneous Income," or successor form, unless the amount of tax withheld

under section 3402(t) is repaid to the payee before January 1, 2013.

(u) *Effective/applicability date.* This section applies to payments by the Government of the United States, every State, every political subdivision thereof, and every instrumentality of the foregoing (including multi-State agencies) to any person providing property or services made after December 31, 2012, except that paragraph (t) of this section applies to payments made after December 31, 2011, and before January 1, 2013.

§ 31.3402(t)–5 Application to passthrough entities.

(a) *In general.* Section 3402(t)(1) does not apply to payments made by passthrough entities except as described in paragraph (c) of this section. In addition, section 3402(t)(1) applies to payments made to passthrough entities except as described in paragraph (d) of this section.

(b) *Definitions.* The following definitions apply for purposes of this section:

(1) *Passthrough entity.* The term *passthrough entity* means a partnership (for Federal income tax purposes) or an S corporation.

(2) *Owner.* The term *owner* means a partner (for Federal income tax purposes) or an S corporation shareholder.

(3) *Ownership percentage.* The term *ownership percentage* means an owner's interest, as a percentage, in partnership profits or capital (whichever is greater) in the case of a partnership, or an owner's interest, as a percentage, in S corporation stock in the case of an S corporation.

(4) *Testing day.* The term *testing day* refers to the first day of a passthrough entity's taxable year.

(c) *Payments from a passthrough entity*—(1) *General rule.* Section 3402(t)(1) does not apply to payments made by passthrough entities during the taxable year, except as provided in paragraph (c)(2) of this section.

(2) *Exception.* Section 3402(t)(1) applies to any payment during the taxable year from a passthrough entity if the aggregate ownership percentage held, directly or indirectly, in the entity on the testing day by one or more of the government entities described in section 3402(t)(1) is at least 80 percent. For purposes of this paragraph (c)(2), any manipulation of the ownership percentage with an intent to avoid application of section 3402(t) will be recharacterized as appropriate to reflect the actual ownership percentage.

(d) *Payments to a passthrough entity*—(1) *General rule.* Section 3402(t)(1) applies to payments made to passthrough entities during the taxable year, except as provided in paragraph (d)(2) of this section.

(2) *Exception*—(i) *In general.* Section 3402(t)(1) does not apply to any payment during the taxable year to a passthrough entity if the aggregate ownership percentage held, directly or indirectly, in the entity on the testing day by one or more persons each of which is described in section 3402(t)(2)(E) or is an Indian Tribal government is at least 80 percent. For purposes of this paragraph (d)(2)(i), any manipulation of the ownership percentage with an intent to avoid application of section 3402(t) will be recharacterized as appropriate to reflect the actual ownership percentage, if the government entity making the payment knew or should have known that the payee's ownership percentage had been manipulated with intent to avoid application of section 3402(t).

(ii) *Payments derived from sources outside the United States.* Section 3402(t)(1) does not apply to any payment during the taxable year to a partnership if the aggregate ownership percentage held, directly or indirectly, in the partnership on the testing day by one or more persons each of which is a nonresident alien individual or foreign corporation is at least 80 percent, and the payment to the partnership is not effectively connected with the conduct of a trade or business within the United States by the partnership, and is derived from sources outside the United States, as determined under sections 861, 862, 863, and 865. For purposes of this paragraph (d)(2)(ii), any manipulation of the ownership percentage with an intent to avoid application of section 3402(t) will be recharacterized as appropriate to reflect the actual ownership percentage, if the government entity making the payment knew or should have known that the payee's ownership percentage had been manipulated with intent to avoid application of section 3402(t).

(e) *Effective/applicability date.* This section applies to payments by the Government of the United States, every State, every political subdivision thereof, and every instrumentality of the foregoing (including multi-State agencies) to any person providing property or services made after December 31, 2012.

§ 31.3402(t)–6 Crediting of tax withheld under section 3402(t).

(a) *Credit against income tax liability only.* Tax withheld under section 3402(t) is allowable as a credit against the tax imposed by Subtitle A of the Internal Revenue Code (Code) upon the recipient of the income in accordance with the rules set forth in section 31(a) and § 1.31–1 of this chapter. Tax withheld under section 3402(t) is not allowable as a credit against taxes imposed on wages or compensation of employees under Chapters 21, 22, 23, or 24 of the Code.

(b) *Taxable year of credit.* Tax withheld under section 3402(t) during any calendar year is allowed as a credit against the tax imposed by Subtitle A in accordance with section 31(a)(2) of the Code and § 1.31–1(b) of this chapter.

(c) *Estimated tax.* The tax withheld under section 3402(t) and allowable as a credit under section 31(a) may be taken into account in determining estimated tax liability under sections 6654 and 6655 for the taxable year against which the taxes may be credited under paragraph (b) of this section.

(d) *Effective/applicability date.* This section applies with respect to amounts withheld under section 3402(t) after December 31, 2012.

§ 31.3402(t)–7 Transition relief from interest and penalties.

(a) *Good faith exception for interest and penalties on payments made before January 1, 2014.* Government entities that make a good faith effort to comply with the withholding requirements in § 31.3402(t)–1 will not be liable for interest and penalties with respect to income tax withholding under section 3402(t) that the government entity failed to withhold from payments made before January 1, 2014. However, this provision does not relieve the government entity of liability for income tax that it failed to withhold. See, however, § 31.3402(d)–1.

(b) *Effective/Applicability Date.* This section applies with respect to payments made after December 31, 2012.

■ **Par. 3.** Section 31.3406(g)–2 is amended by adding paragraphs (h) and (i) to read as follows:

§ 31.3406(g)–2 Exception for reportable payment for which withholding is otherwise required.

* * * * *

(h) *Certain payments made by government entities.* A government entity that is required to withhold both on reportable payments pursuant to section 3406(a) and on certain payments pursuant to section 3402(t) must comply with the withholding requirements of section 3406, and not section 3402(t), for each payment to which both types of withholding would apply. Pursuant to section 3402(t)(2)(B), withholding under section 3402(t) does not apply to a given payment if amounts are being withheld

under section 3406 for that payment. If a government entity fails to withhold as required under section 3406, the payment will not be deemed to be subject to withholding under another provision of the Internal Revenue Code for purposes of this paragraph (h). Thus, even if the government entity withholds on such payment pursuant to section 3402(t), it will remain liable for the amount required to be withheld under section 3406.

(i) *Effective/applicability date.* Paragraph (h) of this section relating to certain payments made by government entities applies to payments made by government entities under section 3402(t) made after December 31, 2012.

■ **Par. 4.** Section 31.6011(a)–4 is amended by revising paragraphs (b)(4) and (5) and adding paragraph (b)(6) and revising paragraph (d) to read as follows:

§ 31.6011(a)–4 Returns of income tax withheld.

* * * * *

(b) * * *

(4) Pensions, annuities, IRAs, and certain other deferred income subject to withholding under section 3405;

(5) Reportable payments subject to backup withholding under section 3406; and

(6) Certain payments made by government entities subject to withholding under section 3402(t).

* * * * *

(d) *Effective/applicability date.* Paragraph (b)(6) of this section (relating to certain payments made by government entities subject to withholding under section 3402(t)) applies to payments made by government entities under section 3402(t) made after December 31, 2012.

■ **Par. 5.** Section 31.6051–5 is added to read as follows:

§ 31.6051–5 Statement and information return required in case of withholding by government entities.

(a) *Statements required from government entities.* Every government entity required to deduct and withhold tax under section 3402(t) must furnish to the payee a written statement containing the information required by paragraph (d) of this section.

(b) *Information returns required from government entities.* Every government entity required to furnish a payee statement under paragraph (a) of this section must file a duplicate of such statement with the Internal Revenue Service. Such duplicate constitutes an information return.

(c) *Prescribed form.* The prescribed form for the statement required by this section is Form 1099–MISC, "Miscellaneous Income," or any successor form.

(d) *Information required.* Each statement on Form 1099–MISC (or any successor form) must show the following—

(1) The name, address, and taxpayer identification number of the person receiving the payment subject to withholding under section 3402(t);

(2) The amount of the payment withheld upon;

(3) The amount of tax deducted and withheld under section 3402(t);

(4) The name, address, and taxpayer identification number of the government entity filing the form;

(5) A legend stating that such amount is being reported to the Internal Revenue Service; and

(6) Such other information as is required by the form and the instructions.

(e) *Time for furnishing statements.* The statement required by paragraph (a) of this section must be furnished to the payee no later than January 31 of the year following the calendar year in which the payment subject to withholding was made. However, the February 15 due date under section 6045 applies to the statement if the statement is furnished in a consolidated reporting statement under section 6045. *See* §§ 1.6045–1(k(3), 1.6045–2(d)(2), 1.6045–3(e)(2), 1.6045–4(m)(3), and 1.6045–5(a)(3)(ii) of this chapter.

(f) *Cross references.* For provisions relating to the time for filing the information returns required by this section with the Internal Revenue Service and to extensions of the time for filing the returns, see §§ 31.6071(a)–1(a)(3), 1.6081–1 of this chapter, and 1.6081–8 of this chapter. For penalties applicable to failure to file information returns and furnish payee statements, see sections 6721 through 6724.

(g) *Effective/applicability date.* This section applies for calendar years beginning on or after January 1, 2013.

■ **Par. 6.** Section 31.6071(a)–1 is amended by revising paragraphs (a)(3)(i) and (g) to read as follows:

§ 31.6071(a)–1 Time for filing returns and other documents.

(a) * * *

(3) *Information returns*—(i) *General rule.* Each information return in respect of wages as defined in the Federal Insurance Contributions Act or of income tax withheld from wages as required under § 31.6051–2 or of income tax withheld from payments by government entities as required under § 31.6051–5 must be filed on or before the last day of February (March 31 if filed electronically) of the year following the calendar year for which it is made, except that, if a tax return under § 31.6011(a)-5(a) is filed as a final return for a period ending prior to December 31, the information return must be filed on or before the last day of the second calendar month following the period for which the tax return is filed.

* * * * *

(g) The requirement under paragraph (a)(3)(i) of this section pertaining to the information return in respect of income tax withheld by government entities as required by § 31.6051–5 of this part applies for calendar years beginning on or after January 1, 2013.

■ **Par. 7.** Section 31.6302–1 is amended by:

1. Revising paragraph (e)(1)(iii)(C).
2. Adding paragraph (e)(1)(iii)(E).
3. Revising paragraph (n).

The revisions and additions read as follows:

§ 31.6302–1 Deposit rules for taxes under the Federal Insurance Contributions Act (FICA) and withheld income taxes.

* * * * *

(e) * * *

(1) * * *

(iii) * * *

(C) Certain annuities described in section 3402(o)(1)(B);

* * * * *

(E) Certain payments made by government entities under section 3402(t); and

* * * * *

(n) *Effective/applicability date.* Except for the deposit of employment taxes attributable to payments made by government entities under section 3402(t), §§ 31.6302–1 through 31.6302–3 apply with respect to the deposit of employment taxes attributable to payments made after December 31, 1992. Paragraph (e)(1)(iii)(E) of this section applies with respect to the deposit of employment taxes attributable to payments made by government entities under section 3402(t) made after December 31, 2012.

* * * * *

■ **Par. 8.** Section 31.6302–4 is amended by:

■ 1. Revising paragraph (b)(4).
■ 2. Revising paragraph (b)(5).
■ 3. Adding paragraph (b)(6).
■ 4. Revising paragraph (e).

The revisions and additions read as follows:

§ 31.6302–4 Deposit rules for withheld income taxes attributable to nonpayroll payments.

* * * * *

(b) * * *

(4) Amounts withheld under section 3405, relating to withholding on pensions, annuities, IRAs, and certain other deferred income;

(5) Amounts withheld under section 3406, relating to backup withholding with respect to reportable payments; and

(6) Amounts withheld under section 3402(t), relating to certain payments made by government entities.

* * * * *

(e) *Effective/applicability date.* Section 31.6302–4(d) applies to deposits and payments made after December 31, 2010. Paragraph (b)(6) of this section relating to certain payments made by government entities applies to payments made by government entities under section 3402(t) made after December 31, 2012.

Steven T. Miller,

Deputy Commissioner for Services and Enforcement.

Approved: April 26, 2011.

Michael Mundaca,

Assistant Secretary of the Treasury (Tax Policy).

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DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Parts 3, 100, and 165

[Docket No. USCG–2011–0368]

RIN 1625–ZA30

Reorganization of Sector North Carolina; Technical Amendment

AGENCY: Coast Guard, DHS.

ACTION: Final rule.

SUMMARY: This rule makes non-substantive amendments to reflect the Coast Guard's reorganization of Sector North Carolina. The amendments describe the boundaries of Sector North Carolina's Marine Inspection Zone and Captain of the Port Zone, and provide updated contact information.

DATES: This final rule is effective May 9, 2011.

ADDRESSES: Materials mentioned in this preamble as being available in the docket are part of docket USCG–2011–0368 and are available for inspection or copying at the Docket Management Facility (M–30), U.S. Department of Transportation, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. You may also find this docket online at *http://www.regulations.gov,* inserting USCG–2011–0368 in the "Enter Keyword or ID" box, and then clicking "Search."

FOR FURTHER INFORMATION CONTACT: If you have questions on this rule, call or e-mail LT Kevin Sullivan, Sector North Carolina, Coast Guard; telephone 910–343–3876, e-mail *Kevin.J.Sullivan2@uscg.mil.* If you have questions on viewing the docket, call Renee V. Wright, Program Manager, Docket Operations, telephone 202–366–9826.

SUPPLEMENTARY INFORMATION:

Table of Contents

I. Regulatory History

We did not publish a notice of proposed rulemaking (NPRM) for this regulation. The Coast Guard finds that this rule is exempt from notice and comment rulemaking requirements under 5 U.S.C. 553(b)(A) because the changes involve agency organization. The Coast Guard also finds good cause exists under 5 U.S.C. 553(b)(B) for not publishing an NPRM because the changes will have no substantive effect on the public, and notice and comment are therefore unnecessary. For the same reasons, the Coast Guard finds good cause under 5. U.S.C. 553(d)(3) to make the rule effective fewer than 30 days after publication in the **Federal Register.**

II. Abbreviations

COTP Captain of the Port
DHS Department of Homeland Security
FR **Federal Register**
MSU Marine Safety Unit
NPRM Notice of Proposed Rulemaking
§ Section symbol
U.S.C. United States Code

III. Basis and Purpose

The Coast Guard has reorganized Sector North Carolina. The Coast Guard has the authority to do so under 14 U.S.C. 92, which gives the Secretary of Homeland Security the authority to establish the limits of, consolidate, discontinue, and re-establish Coast Guard districts; and DHS Delegation 0170.1, which delegates that authority to the Coast Guard.

The previous organization of Sector North Carolina was described in regulations, which also contain contact details and other references to Sector North Carolina. This technical amendment updates those regulations so that they contain current information.

IV. Background

Sector North Carolina was established by a 2007 technical amendment that updated regulations to reflect a broad sector realignment (72 FR 36316, July 2, 2007). At that time, Sector North Carolina's office was located in Fort Macon, NC, with a Marine Safety Unit (MSU) in Wilmington, NC, responsible for the Cape Fear River Marine Inspection and Captain of the Port (COTP) Zones. Various regulations addressing marine events, safety zones, and regulated navigational areas contained references to Sector North Carolina, MSU Wilmington, and the Cape Fear River Marine Inspection and COTP Zones.

The Coast Guard has now reorganized Sector North Carolina by moving the Sector office to Wilmington, NC and by disestablishing MSU Wilmington and the Cape Fear River Marine Inspection and COTP Zones. This reorganization is intended to improve field-level operations in the region and improve access to the Sector Commander for the industry within the Port of Wilmington. The consolidation into one COTP zone will strengthen unity of command in the Sector North Carolina area of responsibility and provide a single interface point for state and local officials.

V. Discussion of Changes

This rule amends 33 CFR part 3 to reflect the new organization of Sector North Carolina. The revised § 3.25–20 indicates that Sector North Carolina's office is located in Wilmington, NC, rather than in Fort Macon, NC, and eliminates the separate description of the Cape Fear River Marine Inspection and COTP Zones. The boundaries of the Sector's Marine Inspection Zone and COTP Zone are otherwise unchanged, except for the correction of a typographical error that previously had

placed the offshore boundary outside the exclusive economic zone.

This rule also amends 33 CFR part 100, addressing special local regulations for marine events in the Fifth Coast Guard District. Specifically, it removes § 100.501(d)(5), which had referred to the Cape Fear River COTP Zone, and revises § 100.501(d) to provide updated contact information.

This rule amends several sections of 33 CFR part 165 affecting safety zones and a regulated navigation area. Specifically, it provides updated contact information and updated COTP designations in §§ 165.506, 165.514, 165.515, 165.518, 165.530, and 165.540. These changes do not place any new requirements on the public.

VI. Regulatory Analyses

We developed this rule after considering numerous statutes and executive orders related to rulemaking. Below we summarize our analyses based on 13 of these statutes or executive orders.

A. Executive Order 12866 and Executive Order 13563

This rule is not a significant regulatory action under section 3(f) of Executive Order 12866, Regulatory Planning and Review, as supplemented by Executive Order 13563, and does not require an assessment of potential costs and benefits under section 6(a)(3) of that Order. The Office of Management and Budget has not reviewed it under that Order. Because this rule involves internal agency organization and non-substantive changes, it will not impose any costs on the public.

B. Small Entities

Under the Regulatory Flexibility Act (5 U.S.C. 601–612), we have considered whether this rule would have a significant economic impact on a substantial number of small entities. The term "small entities" comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000. This rule does not require a general NPRM and therefore is exempt from the requirements of the Regulatory Flexibility Act. Although this rule is exempt, we have considered its potential impact on small entities and found that it will not have a significant economic impact on a substantial number of small entities.

C. Assistance for Small Entities

Small businesses may send comments on the actions of Federal employees who enforce, or otherwise determine compliance with, Federal regulations to the Small Business and Agriculture Regulatory Enforcement Ombudsman and the Regional Small Business Regulatory Fairness Boards. The Ombudsman evaluates these actions annually and rates each agency's responsiveness to small business. If you wish to comment on actions by employees of the Coast Guard, call 1–888–REG–FAIR (1–888–734–3247). The Coast Guard will not retaliate against small entities that question or complain about this rule or any policy or action of the Coast Guard.

D. Collection of Information

This rule calls for no new collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520).

E. Federalism

A rule has implications for federalism under Executive Order 13132, Federalism, if it has a substantial direct effect on State or local governments and would either preempt State law or impose a substantial direct cost of compliance on them. We have analyzed this rule under that Order and have determined that it does not have implications for federalism.

F. Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538) requires Federal agencies to assess the effects of their discretionary regulatory actions. In particular, the Act addresses actions that may result in the expenditure by a State, local, or tribal government, in the aggregate, or by the private sector of $100,000,000 (adjusted for inflation) or more in any one year. Though this rule will not result in such an expenditure, we do discuss the effects of this rule elsewhere in this preamble.

G. Taking of Private Property

This rule will not cause a taking of private property or otherwise have taking implications under Executive Order 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights.

H. Civil Justice Reform

This rule meets applicable standards in sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity, and reduce burden.

I. Protection of Children

We have analyzed this rule under Executive Order 13045, Protection of Children from Environmental Health Risks and Safety Risks. This rule is not an economically significant rule and does not create an environmental risk to health or risk to safety that may disproportionately affect children.

J. Indian Tribal Governments

This rule does not have tribal implications under Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, because it does not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

K. Energy Effects

We have analyzed this rule under Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use. We have determined that it is not a "significant energy action" under that order because it is not a "significant regulatory action" under Executive Order 12866 and is not likely to have a significant adverse effect on the supply, distribution, or use of energy. The Administrator of the Office of Information and Regulatory Affairs has not designated it as a significant energy action. Therefore, it does not require a Statement of Energy Effects under Executive Order 13211.

L. Technical Standards

The National Technology Transfer and Advancement Act (NTTAA) (15 U.S.C. 272 note) directs agencies to use voluntary consensus standards in their regulatory activities unless the agency provides Congress, through the Office of Management and Budget, with an explanation of why using these standards would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (*e.g.,* specifications of materials, performance, design, or operation; test methods; sampling procedures; and related management systems practices) that are developed or adopted by voluntary consensus standards bodies. This rule does not use technical standards. Therefore, we did not consider the use of voluntary consensus standards.

M. Environment

We have analyzed this rule under Department of Homeland Security Management Directive 023–01 and

Commandant Instruction M16475.lD, which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321–4370f), and have concluded that this action is one of a category of actions that do not individually or cumulatively have a significant effect on the human environment. This rule is categorically excluded under section 2.B.2, figure 2–1, paragraph (34)(a) of the Instruction. This rule involves editorial or procedural regulations. An environmental analysis checklist and a categorical exclusion determination are available in the docket where indicated under **ADDRESSES**.

List of Subjects

33 CFR Part 3

Organization and functions (Government agencies).

33 CFR Part 100

Marine safety, Navigation (water), Reporting and recordkeeping requirements, and Waterways.

33 CFR Part 165

Harbors, Marine safety, Navigation (water), Reporting and recordkeeping requirements, Security measures, and Waterways.

For the reasons discussed in the preamble, the Coast Guard amends 33 CFR parts 3, 100, and 165 as follows:

PART 3—COAST GUARD AREAS, DISTRICTS, SECTORS, MARINE INSPECTION ZONES, AND CAPTAIN OF THE PORT ZONES

■ 1. The authority citation for part 3 continues to read as follows:

Authority: 14 U.S.C. 92; Pub. L. 107–296, 116 Stat. 2135; Department of Homeland Security Delegation No. 0170.1, para. 2(23).

■ 2. Revise § 3.25–20 to read as follows:

§ 3.25–20 Sector North Carolina Marine Inspection Zone and Captain of the Port Zone.

Sector North Carolina's office is located in Wilmington, NC. The boundary of Sector North Carolina's Marine Inspection Zone and Captain of the Port Zone starts at the sea on the North Carolina-Virginia border at 36 deg 33.04 min N. latitude, 75 deg 52.05 min W. longitude, and proceeds westerly along the North Carolina-Virginia boundary to the Tennessee boundary; thence southwesterly along the North Carolina-Tennessee boundary to the Georgia boundary and then to the South Carolina boundary; thence easterly along the North Carolina-South Carolina boundary on the sea at 33 deg 51.06 min N. latitude, 78 deg 32.46 min W. longitude. The offshore boundary starts at the North Carolina-South Carolina border and proceeds southeasterly to the outermost extent of the EEZ at 31 deg 42.1 min N. latitude, 74 deg 30.75 min W. longitude; thence northeasterly along the outermost extent of the Exclusive Economic Zone to a point at 36 deg 32.99 min N. latitude, 71 deg 29.56 min W. longitude; thence west to the North Carolina-Virginia border at a point 36 deg 33.04 min N. latitude, 75 deg 52.05 min W. longitude.

PART 100—SAFETY OF LIFE ON NAVIGABLE WATERS

■ 3. The authority citation for part 100 continues to read as follows:

Authority: 33 U.S.C. 1233.

■ 4. Amend § 100.501 by revising paragraph (d)(4) to read as follows and removing paragraph (d)(5).

§ 100.501 Special Local Regulations; Marine Events in the Fifth Coast Guard District.

* * * * *

(d) * * *

(4) Coast Guard Sector North Carolina—Captain of the Port Zone, North Carolina: (877) 229–0770 or (910) 772–2200.

* * * * *

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

■ 5. The authority citation for part 165 continues to read as follows:

Authority: 33 U.S.C. 1231; 46 U.S.C. Chapter 701, 3306, 3703; 50 U.S.C. 191, 195; 33 CFR 1.05–1, 6.04–1, 6.04–6, and 160.5; Pub. L. 107–295, 116 Stat. 2064; Department of Homeland Security Delegation No. 0170.1.

■ 6. Amend § 165.506 to revise paragraph (c)(4) to read as follows:

§ 165.506 Safety Zones; Fifth Coast Guard District Fireworks Displays.

* * * * *

(c) * * *

(4) Coast Guard Sector North Carolina—Captain of the Port Zone, Wilmington, NC: (877) 229–0770 or (910) 772–2200.

* * * * *

■ 7. Amend § 165.514 as follows:

■ a. In paragraph (b) introductory text and paragraph (c)(1), remove the word "Wilmington" wherever it appears and add, in its place, the words "North Carolina"; and

■ b. Revise the last sentence in paragraph (d) to read as follows:

§ 165.514 Safety Zone: Atlantic Intracoastal Waterway and connecting waters, vicinity of Marine Corps Base Camp Lejeune, North Carolina.

* * * * *

(d) * * * The Captain of the Port may be contacted at Sector North Carolina by telephone at (877) 229–0770 or (910) 772–2200.

■ 8. Amend § 165.515 as follows:

■ a. In paragraph (b), remove the word "Wilmington,"; and

■ b. Revise the first sentence after the italic heading in paragraph (c) to read as follows:

§ 165.515 Safety Zone: Cape Fear River, Wilmington, North Carolina.

* * * * *

(c) * * * The Captain of the Port and the Command Duty Officer at Sector North Carolina can be contacted at telephone number (877) 229–0770 or (910) 772–2200. * * *

* * * * *

§ 165.518 [Amended]

■ 9. In § 165.518(c)(7), remove the text "Wilmington: (910) 772–2200 or (910) 254–1500" and add, in its place, the text "North Carolina: (877) 229–0770 or (910) 772–2200".

■ 10. Amend § 165.530 as follows:

■ a. In paragraph (a), remove the word "Wilmington";

■ b. Revise the first sentence of paragraph (b)(1) to read as follows; and

■ c. Revise paragraph (b)(3) to read as follows:

§ 165.530 Safety Zone: Cape Fear and Northeast Cape Fear Rivers, NC.

* * * * *

(b) * * *

(1) The Captain of the Port and the Command Duty Officer at Sector North Carolina can be contacted at telephone number (877) 229–0770 or (910) 772–2200. * * *

* * * * *

(3) Sector North Carolina will notify the maritime community of periods during which this safety zone will be in effect by providing advance notice of scheduled arrivals and departures of loaded hazardous materials vessels via a marine Broadcast Notice to Mariners.

* * * * *

§ 165.540 [Amended]

■ 11. In § 165.540(f)(10), remove the word "Wilmington" and add, in its place, the words "North Carolina".

Dated: May 4, 2011.

Kathryn A. Sinniger,

Chief, Office of Regulations and Administrative Law, U.S. Coast Guard.

[FR Doc. 2011–11261 Filed 5–6–11; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 117

[Docket No. USCG–2011–0311]

Drawbridge Operation Regulation; Neches River, Beaumont, TX

AGENCY: Coast Guard, DHS.

ACTION: Notice of temporary deviation from regulations.

SUMMARY: The Commander, Eighth Coast Guard District, has issued a temporary deviation from the regulation governing the operation of the KCS vertical lift span bridge across the Neches River, mile 19.5, at Beaumont, Texas. The deviation is necessary to replace four haul cables on the bridge. This deviation allows the bridge to remain closed to navigation for 72 consecutive hours.

DATES: This deviation is effective from 7 a.m. on Monday, May 23, 2011 to 7 a.m. on Thursday, May 26, 2011.

ADDRESSES: Documents mentioned in this preamble as being available in the docket are part of docket USCG–2011–0311 and are available online by going to *http://www.regulations.gov,* inserting USCG–2011–0252 in the "Keyword" box and then clicking "Search." They are also available for inspection or copying at the Docket Management Facility (M–30), U.S. Department of Transportation, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: If you have questions on this rule, call or e-mail David Frank, Bridge Administration Branch, Coast Guard; telephone 504–671–2128, e-mail *David.M.Frank@uscg.mil.* If you have questions on viewing the docket, call Renee V. Wright, Program Manager, Docket Operations, telephone 202–366–9826.

SUPPLEMENTARY INFORMATION: The Kansas City Southern Railroad has requested a temporary deviation from the operating schedule of the vertical lift span bridge across the Neches River at mile 19.5 in Beaumont, Texas. The vertical clearance of the bridge in the closed-to-navigation position is 13 feet above Mean High Water and 140 feet above Mean High Water in the open-to-navigation position.

In accordance with 33 CFR 117.971, the vertical lift span of the bridge is automated and normally not manned but will open on signal for the passage of vessels. This deviation allows the vertical lift span of the bridge to remain closed to navigation from 7 a.m. on Monday, May 23, 2011 through 7 a.m. on Thursday, May 26, 2011.

The closure is necessary in order to replace four haul cables on the bridge that allow the bridge to be raised. This maintenance is essential for the continued operation of the bridge. Notices will be published in the Eighth Coast Guard District Local Notice to Mariners and will be broadcast via the Coast Guard Broadcast Notice to Mariners System.

Navigation on the waterway consists of commercial and recreational fishing vessels, small to medium crew boats, and small tugs with and without tows. No alternate routes are available for the passage of vessels; however, the closure was coordinated with waterway interests who have indicated that they will be able to adjust their operations around the proposed work schedule. Small vessels may pass under the bridge while in the closed-to-navigation position provided caution is exercised.

Due to prior experience and coordination with waterway users, it has been determined that this closure will not have a significant effect on vessels that use the waterway.

In accordance with 33 CFR 117.35(e), the drawbridge must return to its regular operating schedule immediately at the end of the designated time period. This deviation from the operating regulations is authorized under 33 CFR 117.35.

Dated: April 26, 2011.

David M. Frank,

Bridge Administrator.

[FR Doc. 2011–11269 Filed 5–6–11; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 117

[Docket No. USCG–2011–0308]

Drawbridge Operation Regulation; Illinois Waterway, Near Morris, IL

AGENCY: Coast Guard, DHS.

ACTION: Notice of temporary deviation from regulations.

SUMMARY: The Commander, Eighth Coast Guard District, has issued a temporary deviation from the regulation governing the operation of the Elgin, Joliet, and Eastern Railroad Drawbridge across the Illinois Waterway, mile 270.6, near Morris, Illinois. The deviation is necessary to allow removal of the existing lift span and installation of the replacement lift span. This deviation allows the bridge to be maintained in the closed-to-navigation position for eighty-four hours.

DATES: This deviation is effective starting 7 a.m. on or about June 2, 2011, for an eighty-four hour period.

ADDRESSES: Documents mentioned in this preamble as being available in the docket are part of docket USCG–2011–0308 and are available online by going to *http://www.regulations.gov,* inserting USCG–2011–0308 in the "Keyword" box and then clicking "Search." They are also available for inspection or copying at the Docket Management Facility (M–30), U.S. Department of Transportation, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: If you have questions on this rule, call or e-mail Eric A. Washburn, Bridge Administrator, Western Rivers, Coast Guard; telephone (314) 269–2378, e-mail *Eric.Washburn@uscg.mil.* If you have questions on viewing the docket, call Renee V. Wright, Program Manager, Docket Operations, telephone (202) 366–9826.

SUPPLEMENTARY INFORMATION: The Canadian National Railroad requested a temporary deviation for Elgin, Joliet, and Eastern Railroad Drawbridge, across the Illinois Waterway, mile 270.6, near Morris, Illinois to remain in the closed-to-navigation position for eighty-four hours while the existing lift span is removed and the replacement lift span is installed. The Elgin, Joliet, and Eastern Railroad Drawbridge currently operates in accordance with 33 CFR 117.5, which states the general requirement that drawbridges shall open promptly and fully for the passage of vessels when a request to open is given in accordance with the subpart.

There are no alternate routes for vessels transiting this section of the Illinois Waterway.

The Elgin, Joliet, and Eastern Railroad Drawbridge, in the closed-to-navigation position, provides a vertical clearance of 26.3 feet above flat pool. Navigation on the waterway consists primarily of commercial tows and recreational watercraft. This temporary deviation has been coordinated with waterway users. No objections were received.

In accordance with 33 CFR 117.35(e), the drawbridge must return to its regular operating schedule immediately at the end of the designated time period. This

deviation from the operating regulations is authorized under 33 CFR 117.35.

Dated: April 26, 2011.

Eric A. Washburn,

Bridge Administrator.

[FR Doc. 2011–11060 Filed 5–6–11; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket No. USCG–2011–0288]

RIN 1625–AA00

Safety Zone; Air Power Over Hampton Roads, Back River, Hampton, VA

AGENCY: Coast Guard, DHS.

ACTION: Temporary final rule.

SUMMARY: The Coast Guard is establishing a temporary safety zone on the navigable waters of the Back River in the vicinity of Hampton, VA. This action is necessary to provide for the safety of life on navigable waters during the Air Power Over Hampton Roads Air Show. This action is intended to restrict vessel traffic movement in the vicinity of Willoughby Point, VA to protect mariners from the hazards associated with air show events.

DATES: This rule is effective from 5 p.m. on May 13, 2011 through 5 p.m. on May 15, 2011.

ADDRESSES: Documents indicated in this preamble as being available in the docket are part of docket USCG–2011–0288 and are available online by going to *http://www.regulations.gov,* inserting USCG–2011–0288 in the "Keyword" box, and then clicking "Search." They are also available for inspection or copying at the Docket Management Facility (M–30), U.S. Department of Transportation, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: If you have questions on this temporary rule, call or e-mail LT Michael DiPace, Waterways Management Division Chief, Sector Hampton Roads, Coast Guard; telephone 757–668–5581, e-mail *Michael.S.DiPace@uscg.mil.* If you have questions on viewing the docket, call Renee V. Wright, Program Manager, Docket Operations, telephone 202–366–9826.

SUPPLEMENTARY INFORMATION:

Regulatory Information

The Coast Guard is issuing this temporary final rule without prior notice and opportunity to comment pursuant to authority under section 4(a) of the Administrative Procedure Act (APA) (5 U.S.C. 553(b)). This provision authorizes an agency to issue a rule without prior notice and opportunity to comment when the agency for good cause finds that those procedures are "impracticable, unnecessary, or contrary to the public interest." Under 5 U.S.C. 553(b)(B), the Coast Guard finds that good cause exists for not publishing a notice of proposed rulemaking (NPRM) with respect to this rule because any delay encountered in this regulation's effective date by publishing a NPRM would be contrary to public interest since immediate action is needed to provide for the safety of life and property on navigable waters. Under 5 U.S.C. 553(d)(3), the Coast Guard finds that good cause exists for making this rule effective less than 30 days after publication in the **Federal Register**. Delaying the effective date would be contrary to the public interest since immediate action is needed to ensure the safety of the event participants, spectator craft, and other vessels transiting the event area.

Background and Purpose

Coast Guard Sector Hampton Roads has been notified that Langley Air Force Base will host an air show event in the vicinity of Willoughby Point, VA immediately above the Back River, Hampton, VA. The event is scheduled to take place May 13, 2011 through May 15, 2011. In recent years, there have been unfortunate instances of jets and planes crashing during performances at air shows. Along with a jet or plane crash, there is typically a wide area of scattered debris that also damages property and could cause significant injury or death to mariners observing the air show. Due to the need to protect mariners transiting on the Back River immediately below the Air Show from the hazards associated with a potential jet or plane crash, the Coast Guard is establishing a safety zone bound by the following coordinates: 37°05′35″N/076°20′47″ W; thence to 37°05′43″ N/076°20′14″ W; thence to 37°05′19″ N/076°20′02″ W; thence to 37°05′12″ N/076°20′18″ W (NAD 1983). Access to this area will be temporarily restricted for public safety purposes.

Discussion of Rule

The Coast Guard is establishing a safety zone on specified waters of the Back River bound by the following coordinates: 37°05′35″ N/076°20′47″ W; thence to 37°05′43″ N/076°20′14″ W; thence to 37°05′19″ N/076°20′02″ W; thence to 37°05′12″ N/076°20′18″ W (NAD 1983), in the vicinity of Willoughby Point on the Back River, Hampton, Virginia.

This safety zone is in the interest of public safety during the Hampton Roads Air Show and will be enforced from 5 p.m. to 9 p.m. on May 13, 2011, from 9 a.m. to 5 p.m. on May 14, and from 9 a.m. to 5 p.m. on May 15, 2011. Access to the safety zone will be restricted during the specified dates and times. Except for vessels authorized by the Captain of the Port or his Representative, no person or vessel may enter or remain in the safety zone.

Regulatory Analyses

We developed this rule after considering numerous statutes and executive orders related to rulemaking. Below we summarize our analyses based on 13 of these statutes or executive orders.

Regulatory Planning and Review

This rule is not a significant regulatory action under section 3(f) of Executive Order 12866, Regulatory Planning and Review, and does not require an assessment of potential costs and benefits under section 6(a)(3) of that Order. The Office of Management and Budget has not reviewed it under that Order. Although this regulation restricts access to the safety zone, the effect of this rule will not be significant because: (i) The safety zone will be in effect for a limited duration; (ii) the zone is of limited size; (iii) mariners may transit the waters in and around this safety zone at the discretion of the Captain of the Port or designated representative; and (iv), the Coast Guard will make notifications via maritime advisories so mariners can adjust their plans accordingly.

Small Entities

Under the Regulatory Flexibility Act (5 U.S.C. 601–612), we have considered whether this rule would have a significant economic impact on a substantial number of small entities. The term "small entities" comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000.

The Coast Guard certifies under 5 U.S.C. 605(b) that this rule will not have a significant economic impact on a substantial number of small entities.

The rule would affect the following entities, some of which might be small entities: The owners or operators of vessels intending to transit or anchor in a portion of the Back River from 5 p.m. to 9 p.m. on May 13, 2011, from 9 a.m. to 5 p.m. on May 14, and from 9 a.m. to 5 p.m. on May 15, 2011.

This safety zone will not have a significant economic impact on a substantial number of small entities for the following reasons: (i) The safety zone will only be in place for a limited duration. (ii) Before the enforcement period of May 13, 2011 to May 15, 2011, maritime advisories will be issued allowing mariners to adjust their plans accordingly.

If you think that your business, organization, or governmental jurisdiction qualifies as a small entity and that this rule would have a significant economic impact on it, please submit a comment (see **ADDRESSES**) explaining why you think it qualifies and how and to what degree this rule would economically affect it.

Assistance for Small Entities

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), we offer to assist small entities in understanding the rule so that they can better evaluate its effects on them and participate in the rulemaking process.

Small businesses may send comments on the actions of Federal employees who enforce, or otherwise determine compliance with, Federal regulations to the Small Business and Agriculture Regulatory Enforcement Ombudsman and the Regional Small Business Regulatory Fairness Boards. The Ombudsman evaluates these actions annually and rates each agency's responsiveness to small business. If you wish to comment on actions by employees of the Coast Guard, call 1–888–REG–FAIR (1–888–734–3247). The Coast Guard will not retaliate against small entities that question or complain about this rule or any policy or action of the Coast Guard.

Collection of Information

This rule calls for no new collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520).

Federalism

A rule has implications for federalism under Executive Order 13132, Federalism, if it has a substantial direct effect on State or local governments and would either preempt State law or impose a substantial direct cost of compliance on them. We have analyzed this rule under that Order and have determined that it does not have implications for federalism.

Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538) requires Federal agencies to assess the effects of their discretionary regulatory actions. In particular, the Act addresses actions that may result in the expenditure by a State, local, or tribal government, in the aggregate, or by the private sector of $100,000,000 or more in any one year. Though this rule will not result in such an expenditure, we do discuss the effects of this rule elsewhere in this preamble.

Taking of Private Property

This rule will not affect a taking of private property or otherwise have taking implications under Executive Order 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights.

Civil Justice Reform

This rule meets applicable standards in sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity, and reduce burden.

Protection of Children

We have analyzed this rule under Executive Order 13045, Protection of Children from Environmental Health Risks and Safety Risks. This rule is not an economically significant rule and does not create an environmental risk to health or risk to safety that may disproportionately affect children.

Indian Tribal Governments

This rule does not have tribal implications under Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, because it does not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

Energy Effects

We have analyzed this rule under Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use. We have determined that it is not a "significant energy action" under that order because it is not a "significant regulatory action" under Executive Order 12866 and is not likely to have a significant adverse effect on the supply, distribution, or use of energy. The Administrator of the Office of Information and Regulatory Affairs has not designated it as a significant energy action. Therefore, it does not require a Statement of Energy Effects under Executive Order 13211.

Technical Standards

The National Technology Transfer and Advancement Act (NTTAA) (15 U.S.C. 272 note) directs agencies to use voluntary consensus standards in their regulatory activities unless the agency provides Congress, through the Office of Management and Budget, with an explanation of why using these standards would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (*e.g.,* specifications of materials, performance, design, or operation; test methods; sampling procedures; and related management systems practices) that are developed or adopted by voluntary consensus standards bodies.

This rule does not use technical standards. Therefore, we did not consider the use of voluntary consensus standards.

Environment

We have analyzed this rule under Department of Homeland Security Management Directive 023–01 and Commandant Instruction M16475.lD, which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321–4370f), and have concluded this action is one of a category of actions which do not individually or cumulatively have a significant effect on the human environment. This rule is categorically excluded, under figure 2–1, paragraph (34)(g), of the Instruction. This rule involves establishing a temporary safety zone. An environmental analysis checklist and a categorical exclusion determination will be available in the docket where indicated under **ADDRESSES**.

List of Subjects in 33 CFR Part 165

Harbors, Marine safety, Navigation (water), Reporting and recordkeeping requirements, Security measures, Waterways.

For the reasons discussed in the preamble, the Coast Guard amends 33 CFR part 165 subpart C as follows:

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

■ 1. The authority citation for part 165 continues to read as follows:

Authority: 33 U.S.C. 1231; 46 U.S.C. Chapter 701; 3306, 3703; 50 U.S.C. 191, 195; 33 CFR 1.05–1, 6.04–1, 6.04–6 and 160.5; Pub. L. 107–295, 116 Stat. 2064; Department of Homeland Security Delegation No. 0170.1.

■ 2. Add temporary § 165.T05–0288, to read as follows:

§ 165.T05–0288 Safety Zone; Air Power Over Hampton Roads, Back River, Hampton, VA.

(a) *Regulated area.* The following area is a safety zone: All waters in the vicinity of Willoughby Point on Back River within the area bounded by coordinates 37°05′35″ N/076°20′47″ W, thence to 37°05′43″ N/076°20′14″ W, thence to 37°05′19″ N/076°20′02″ W, thence to 37°05′12″ N/076°20′18″ W. (NAD 1983), in Hampton, VA.

(b) *Definition:* For purposes of enforcement of this section, *Captain of the Port Representative* means any U. S. Coast Guard commissioned, warrant or petty officer who has been authorized by the Captain of the Port, Hampton Roads, Virginia to act on his behalf.

(c) *Regulation:* (1) In accordance with the general regulations in 165.23 of this part, entry into this zone is prohibited unless authorized by the Captain of the Port, Hampton Roads or his designated representatives.

(2) The operator of any vessel in the immediate vicinity of this safety zone shall:

(i) Stop the vessel immediately upon being directed to do so by any commissioned, warrant or petty officer on board a vessel displaying a U.S. Coast Guard Ensign; and

(ii) Proceed as directed by any commissioned, warrant or petty officer on board a vessel displaying a U.S. Coast Guard Ensign.

(3) The Captain of the Port, Hampton Roads, Virginia can be contacted at telephone number (757) 638–6637.

(4) U.S. Coast Guard vessels enforcing the safety zone can be contacted on VHF–FM marine band radio, channel 13 (156.65 MHz) and channel 16 (156.8 MHz).

(d) *Enforcement period:* This rule will be enforced from 5 p.m. to 9 p.m. on May 13, 2011, from 9 a.m. to 5 p.m. on May 14, and from 9 a.m. to 5 p.m. on May 15, 2011.

Dated: April 21, 2011.

Mark S. Ogle,

Captain, U.S. Coast Guard, Captain of the Port Hampton Roads.

[FR Doc. 2011–11276 Filed 5–6–11; 8:45 am]

BILLING CODE 9110–04–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R09–OAR–2010–0430; FRL–9292–7]

Revisions to the California State Implementation Plan, San Joaquin Valley Unified Air Pollution Control District

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: EPA is finalizing approval of revisions to the San Joaquin Valley Unified Air Pollution Control District (SJVUAPCD) portion of the California State Implementation Plan (SIP). These revisions were proposed in the **Federal Register** on May 21, 2010 and concern oxides of nitrogen (NOx) and particulate matter (PM) emissions primarily from indirect sources associated with new development projects as well as NOx and PM emissions from certain transportation and transit projects. We are approving local rules that regulate these emission sources under the Clean Air Act as amended in 1990 (CAA or the Act).

DATES: *Effective Date:* This rule is effective on June 8, 2011.

ADDRESSES: EPA has established docket number EPA–R09–OAR–2010–0430 for this action. The index to the docket is available electronically at *http://www.regulations.gov* and in hard copy at EPA Region IX, 75 Hawthorne Street, San Francisco, California. While all documents in the docket are listed in the index, some information may be publicly available only at the hard copy location (*e.g.,* copyrighted material), and some may not be publicly available in either location (*e.g.,* Confidential Business Information). To inspect the hard copy materials, please schedule an appointment during normal business hours with the contact listed in the **FOR FURTHER INFORMATION CONTACT** section.

FOR FURTHER INFORMATION CONTACT: Lily Wong, EPA Region IX, (415) 947–4114, *wong.lily@epa.gov.*

SUPPLEMENTARY INFORMATION: Throughout this document, "we," "us" and "our" refer to EPA.

Table of Contents

I. Proposed Action

On May 21, 2010 (75 FR 28509), EPA proposed to approve the following rule into the California SIP.

Local agency	Rule No.	Rule title	Adopted	Submitted
SJVUAPCD	9510	Indirect Source Review (ISR)	12/15/05	12/29/06

We proposed to approve this rule because we determined that it complied with the relevant CAA requirements. Our proposed action contains more information on the rule and our evaluation.

II. Public Comments and EPA Responses

EPA's proposed action provided a 30-day public comment period. During this period, we received comments from the following parties.

1. Susan Asmus, National Association of Home Builders (NAHB); letter dated July 6, 2010.

2. Lawrence J. Joseph, representing the American Road & Transportation Builders Association (ARTBA); letter dated July 6, 2010.

3. Paul Cort, EarthJustice; letter dated July 6, 2010.

4. Mat Ciremele, email dated May 25, 2010.

The comments and our responses are summarized below.

Comment #1: NAHB asserts that EPA must disapprove Rule 9510 because a state must provide adequate assurances of the legal authority to carry out all SIP revisions and, in light of NAHB's legal challenge to Rule 9510 in the U.S. Court of Appeals and the possibility of the court's finding section 6.1.1 of Rule 9510 preempted and unenforceable, the SJVUAPCD cannot enforce the emission limitations in section 6.1.1 because the limitations are preempted standards or other requirements.

Response #1: The commenter is correct in asserting that a state must provide assurances of legal authority to carry out SIPs and SIP revisions. See CAA section 110(a)(2)(E)(SIPs must "provide (i) necessary assurances that the State * * * will have adequate * * * authority under State (and, as appropriate, local) law to carry out such implementation plan * * * "). In our Technical Support Document (TSD) for

the proposed rule, we recognized the legal challenge brought by NAHB against the SJVUAPCD in connection with enforcement of Rule 9510. At the time we proposed action on Rule 9510, NAHB had appealed to the Ninth Circuit Court of Appeals [in *National Association of Home Builders* v. *San Joaquin Valley Unified Air Pollution Control District* (No. 08–17309)] to overturn a District Court ruling that held that Rule 9510 was not preempted under the CAA, but the Ninth Circuit had not yet reached a decision on the appeal. Based on the information available to us at the time, we concluded that the SJVUAPCD had the authority to adopt and implement Rule 9510 because we believed that the limits in the rule were not preempted under CAA section 209(e), consistent with the District Court ruling.

Since publication of the proposed rule, the Ninth Circuit has published its opinion in *National Association of Home Builders* v. *San Joaquin Valley Unified Air Pollution Control District, 627 F.3d 730 (9th Cir. 2010) ("NAHB").* In an opinion filed December 7, 2010, the Ninth Circuit affirmed the District Court's ruling that Rule 9510 was not preempted. With respect to the express preemption of CAA section 209(e)(1), which preempts states and subdivisions thereof from adopting or attempting to enforce any standard or other requirement relating to the control of emissions from either of two categories of new nonroad vehicles or engines, the court held that Rule 9510 was not preempted because none of the construction equipment that Rule 9510 regulates would be considered "new" under EPA's pre-existing (and permissible, in the court's view) definition of "new."

Before turning to the implied preemption of CAA section 209(e)(2), which preempts states and subdivisions thereof from adopting or attempting to enforce any standard or other requirement relating to the control of emissions from all other types of nonroad vehicles and engines not covered in CAA section 209(e)(1), the court first determined that Rule 9510 was authorized under CAA section 110(a)(5), the CAA section that allows states and subdivisions thereof to include indirect source review (ISR) programs in a SIP. CAA section 110(a)(5)(C) defines "indirect sources" as meaning "a facility, building, structure, installation, real property, road, or highway which attracts, or may attract, mobile sources of pollution," but also provides that "[d]irect emissions sources or facilities at, within, or associated with, any indirect source shall not be deemed indirect sources for the purposes of this paragraph."

Noting that Rule 9510 is ultimately directed at emissions that come from construction equipment (*i.e.,* direct sources), the court, nonetheless, concluded that Rule 9510 was authorized under section 110(a)(5) because in the court's view, the limitation only makes sense if it is read to prohibit an indirect source review program from targeting direct sources at, within, or associated with, any indirect source *apart* from the program's regulation of an indirect source, and Rule 9510 does not target construction equipment apart from its regulation of development sites. The court also notes that the scope of Rule 9510 indicates that the rule targets sites rather than equipment. The reach of the rule depends on the character of the site, not on the character of the equipment. The court then concluded that the feature that allows Rule 9510 to qualify as an indirect source for the purposes of CAA section 110(a)(5), *i.e.,* its site-based regulation of emissions, was the same feature that allows the rule to avoid preemption under CAA section 209(e)(2).

Given the appellate court's decision, we believe that any significant doubt about the SJVUAPCD's authority to enforce the emissions requirements in section 6.1.1 has been removed, and that our approval of Rule 9510 is consistent with CAA section 110(a)(2)(E) as explained in the proposal.

Comment #2: NAHB asserts that the emission limits of section 6.1.1 of Rule 9510 are preempted under CAA section 209(e)(1) because they represent "standards or other requirements" relating to the control of emissions from new nonroad construction vehicles or engines less than 175 horsepower.

Response #2: CAA section 209(e)(1) states: "No State or any political subdivision thereof shall adopt or attempt to enforce any standard or other requirement relating to the control of emissions from * * * (A) New engines which are used in construction equipment or vehicles or used in farm equipment or vehicles and which are smaller than 175 horsepower. (B) New locomotives or new engines used in locomotives. Subsection (b) of this section shall not apply for purposes of this paragraph." The construction equipment to which section 6.1.1 of Rule 9510 applies is not new equipment. Under EPA's nonroad emissions standard regulations, "new" means "a nonroad engine, nonroad vehicle, or nonroad equipment the equitable or legal title to which has never been transferred to an ultimate purchaser. Where the equitable or legal title to the engine, vehicle, or equipment is not transferred to an ultimate purchaser until after the engine, vehicle, or equipment is placed into service, then the engine, vehicle, or equipment will no longer be new after it is placed into service." See 40 CFR 89.2. This definition was upheld by the Court of Appeals for the District of Columbia in *Engine Manufacturers Association* v. *EPA,* 88 F.3d 1075 (DC Cir. 1996) (*EMA* v. *EPA*), and the 9th Circuit, in *NAHB,* also indicated its view that this definition was permissible.

Rule 9510 applies to applicants that seek final discretionary approval for certain development projects, and thus the emission limits in section 6.1.1 of Rule 9510 apply to construction equipment that has already been purchased or placed into service, and brought to a development site to meet the particular construction needs of a given development project. Therefore, the limits do not apply to new construction equipment within the meaning of CAA section 209(e)(1).

Even if the emission limits in the rule could have the consequence of influencing an applicant early in the planning process in connection with the purchase of construction equipment, for the reasons provided in the TSD to EPA's proposed rule on Rule 9510 and in the responses, EPA believes that the emission limits in section 6.1.1 of Rule 9510 do not represent a standard or other requirement relating to the control of emissions from new nonroad engines or nonroad vehicles, and thus are not preempted under CAA section 209(e)(1).

NAHB references the Supreme Court's decision in *Engine Manufacturers Association* v. *South Coast Air Quality Management District,* 541 U.S. 246 (2004) (*EMA* v. *South Coast*). However, that case involved a regulation of vehicles that clearly were "new," as defined in the statute, as the regulations applied to vehicles at the time of purchase. Rule 9510 applies after the time of purchase of the engine and in any case is directed to the site of the project, not the engine, and can be met in ways that do not implicate the purchase of new engines. The Court of Appeals has ruled that Rule 9510 is not preempted under section 209(e)(1) and we follow and agree with that decision.

Comment #3: NAHB asserts that the emission limits of section 6.1.1 of Rule 9510 are preempted under CAA section 209(e)(2) because they apply to used nonroad construction equipment greater than 50 horsepower.

Response #3: CAA section 209(e)(2) applies to, among other categories of nonroad vehicles and engines, used

nonroad vehicles or engines, and it allows EPA to authorize, after notice and opportunity for public hearing, the State of California to adopt and enforce standards and other requirements relating to the control of emissions from such vehicles or engines if certain criteria are met. As asserted by the commenter, no authorization has been sought from EPA by California for the emission limitations in section 6.1.1 of Rule 9510. However, EPA does not believe such authorization is required because, while section 6.1.1 sets standards relating to the control of emissions from used construction equipment, EPA notes that the standards at issue in this SIP revision relate directly only to emissions associated with development sites. As the Court of Appeals stated, this regulation is authorized as an indirect source review program under section 110(a)(5) of the Act. Rule 9510 does not regulate nonroad engines directly and would not affect nonroad engines apart from the possible effects from the regulation of the indirect source as a whole. The court noted that given the language in section 110 authorizing indirect source programs, they would cautiously examine the Act before concluding that section 209(e)(2) preempted such a program. The court also distinguished the cases cited by NAHB, *EMA* v. *South Coast* and *Pacific Merchant Shipping Ass'n* v. *Goldstene,* 517 F.3d 1108 (9th Cir. 2008), by noting that the regulations in those cases were directed at vehicles, not sites. EPA also notes that Rule 9510 allows compliance with the site-based requirement using actions that would not affect the engines at the site or would only affect the use of the engine, which EPA has already determined is not preempted by section 209(e)(2). See also, *EMA* v. *EPA* and *Pacific Merchant Shipping Ass'n* v. *Goldstene,* 2009 U.S. Dist Lexis 55516, 70 ERC 1337 (E.D. Cal. 2009). Thus any argument that the requirements are de facto standards on nonroad engines is not persuasive. The Court of Appeals has ruled that Rule 9510 is not preempted under section 209(e)(2) and we follow and agree with that decision.

Comment #4: Citing *Engine Manufacturers Association* v. *South Coast Air Quality Management District* [541 U.S. 246 (2004)], NAHB asserts that EPA erred in finding that the emissions limits in Rule 9510 are not preempted under CAA section 209(e) because the standards can be met in numerous ways including options that do not involve any changes to nonroad equipment and that the emission limits in Rule 9510 would be preempted only if they impose burdens so onerous that manufacturers would be forced to alter the design or emission control equipment on new nonroad engines or vehicles.

Response #4: EPA agrees that, if the emission limits in Rule 9510 were standards or other requirements relating to the emissions from nonroad vehicles or engines, then the limits would be preempted under section 209(e) regardless of whether the rule provides for compliance options other than direct reduction of emissions from nonroad vehicles or engines and regardless of whether the limits would in practical effect force manufacturers to alter the design or emission control equipment on new nonroad engines or vehicles. In this case, though, as noted above and as found by the Court of Appeals, the emission limits in Rule 9510 are not such standards.

In the TSD, EPA describes the flexibility provided in Rule 9510 to developers in meeting the emissions limitations not to show that the standards are therefore not preempted, but as further evidence that the rule truly is an indirect source rule that only indirectly regulates emissions from direct sources (such as construction equipment). Furthermore, in the TSD, EPA evaluates the potential for Rule 9510, as an ISR rule otherwise authorized under CAA section 110(a)(5), to nevertheless run afoul of CAA section 209(e), and in so doing, EPA identified two ways that an ISR rule that on its face is authorized under CAA section 110(a)(5) could nonetheless be preempted. First, the ISR rule could be preempted if the rule in practice as applied acts to compel the manufacturer or user of a nonroad engine or vehicle to change the emission control design of the engine or vehicle, or second, an ISR rule could be preempted if it creates incentives so onerous as to be in effect a purchase mandate. EPA concluded, however, that Rule 9510 would not have either type of effect and would not operate in such a way as to amount to a standard controlling the emissions of nonroad vehicles or engines, and thus would not be preempted.

Comment #5: NAHB contrasts EPA's stated position on preemption of state attempts to enforce fleet-based nonroad emissions standards with EPA's proposed approval of section 6.1.1 of Rule 9510 which, in NAHB's view, establishes emissions standards for fleets of construction equipment when used at construction sites subject to Rule 9510.

Response #5: EPA agrees that, if the emission limits in Rule 9510 were standards or other requirements relating to the control of emissions from nonroad vehicles or engines, then the fact that they apply to fleets of construction equipment, rather than to individual nonroad vehicles or engines, would not make any difference as to preemption. Such fleet-based nonroad emission limits would be preempted just as would emission limits that apply to individual nonroad engines or vehicles.

However, as the Court of Appeals found, the emission limits in section 6.1.1. of Rule 9510 are not standards or other requirements relating to the control of emissions from nonroad vehicles or engines, but rather, are emission reduction obligations that relate to the construction-phase at development sites, and as such are not preempted. EPA notes that the rule by its terms (see section 2.0 of the rule) applies to applicants seeking discretionary approval for development projects that meet certain size criteria and to certain transportation or transit projects, not to fleets of nonroad vehicles or engines. EPA also notes that a developer has numerous options to meet the emission reduction obligation in section 6.1.1, including options that do not involve any changes to construction equipment (see section 6.3 of the rule). The flexibility provided in the rule in meeting the emission reduction obligation in section 6.1.1 provides further evidence that the rule is intended to reduce emissions from construction sites as an indirect source of emissions, rather than to regulate the construction equipment directly, either as a fleet or as individual pieces of equipment.

Comment #6: ARTBA petitions EPA to amend EPA's rules implementing CAA section 209(e) to clarify that: (1) Section 209(e) preempts rules based on nonroad fleets to the same extent that it preempts rules based on individual nonroad vehicles and engines; (2) section 209(e)'s preemption lasts throughout nonroad vehicles and engines' useful life; (3) section 209(e)(1)(A) preempts California standards and other requirements related to emissions from farm and construction equipment under 175 horsepower to the same extent that section 209(e)(1)(B) preempts California standards and other requirements related to emissions from locomotives; and (4) section 209(e) preempts emission-based regulation of the use and operation of nonroad vehicles and engines, such as regulations on hours of usage, daily mass emission limits, and fuel restrictions.

Response #6: ARTBA's petition seems to be little more than a renewal of its earlier request for an amendment to

EPA's rule implementing CAA section 209(e). EPA denied ARTBA's petition. See 73 FR 59034 (October 8, 2008). ARTBA's challenge to EPA's denial of ARTBA's petition was dismissed for lack of subject matter jurisdiction by the U.S. Court of Appeals for the DC Circuit. See *Am. Rd. & Transp. Builders Ass'n* v. *EPA,* 588 F.3d 1109 (DC Cir. 2009), petition for cert. denied, No. 09–1485 (U.S. Oct. 4, 2010). ARTBA's petition, except as discussed below, is related to the general preemption issues that ARTBA has raised previously and not specifically to the proposal to add Rule 9510 to the California SIP. EPA has already reviewed these issues several times and is not revisiting these broader issues in this limited proceeding. To the extent ARTBA intends EPA to do so, the request is denied. Further, because EPA did not propose any changes to its rules implementing section 209(e) in this rulemaking on the California SIP, it could not make any such revisions in this final rule in any event.

Comment #7: ARTBA contends that, in EPA's final rule on California's submittal of Rule 9510, EPA should find that EPA's action has "nationwide scope or effect" pursuant to CAA section 307(b)(1) leading to exclusive jurisdiction in the U.S. Court of Appeals for the District of Columbia to ensure nationwide uniformity in the interpretation and enforcement of these important CAA issues.

Response #7: CAA section 307(b)(1) generally provides that judicial review of EPA action in approving a SIP or SIP revisions may be filed only in the U.S. Court of Appeals for the appropriate circuit. Thus, final EPA actions on revisions to the California SIP, such as Rule 9510, are generally subject to timely challenges filed in the U.S. Court of Appeals for the Ninth Circuit. However, judicial review of an EPA SIP action may be filed only in the U.S. Court of Appeals for the District of Columbia if such action is based on a determination of nationwide scope or effect and if in taking such action the EPA finds and publishes that such action is based on such a determination.

We do not believe that our action approving Rule 9510 as a revision to the California SIP is based on a determination of "nationwide scope or effect." While we recognize Rule 9510 as a novel approach for advancing air quality goals, the innovative or unusual nature of the rule alone does not give our approval of it under CAA section 110 "nationwide scope or effect." Once approved, Rule 9510 will become enforceable under the CAA by its terms only to certain development projects within the geographic jurisdiction covered by the SJVUAPCD. Thus, EPA's approval of Rule 9510 is clearly regional in scope and effect.

Of course, EPA's rationale for approval of Rule 9510 sets a precedent for future rulemaking actions on similar ISR rules submitted to EPA as SIP revisions by California or any other state, but the precedential effect in this instance is no different than for EPA actions approving or disapproving any other SIP or SIP revision anywhere in the country. Thus, EPA's action on Rule 9510 is based on a determination of no greater scope or effect than any other EPA action on SIPs, which are reviewable only in the U.S. Courts of Appeal of the appropriate circuit, not necessarily the U.S. Court of Appeals for the District of Columbia.

Comment #8: ARTBA contends that EPA cannot approve Rule 9510 as a SIP revision because: (1) Section 209(e) preempts Rule 9510 as an impermissible standard and "other requirement" related to emissions for construction equipment both above and below 175 horsepower; (2) California and the SJVUAPCD therefore lack authority to enforce Rule 9510, and (3) SIP approval does not meet the criteria or procedures for waiving federal preemption such as California's protectiveness determination, consistency with sections 209 and 202(a), and the opportunity for an EPA hearing.

Response #8: As to preemption issues, please see our responses to comments #2 through #5 above. As to the legal authority to enforce Rule 9510, please see our response to comment #1. Lastly, as to the failure by Rule 9510 to meet the criteria or procedures for waiving preemption, we do not believe that Rule 9510 requires a waiver because, as discussed above and as determined by the Court of Appeals, it is not preempted as it does not establish standards or other requirements relating to the control of emissions of nonroad engines or vehicles for the purposes of CAA section 209(e) but rather establishes standards relating to the control of emissions from an indirect source, the construction phase of development projects.

Comment #9: Citing EPA's TSD for Rule 9510, NAHB notes EPA has concluded that some provisions of Rule 9510 concerning on-site and off-site emissions reductions are not federally enforceable. NAHB asserts that section 172(c)(6) the CAA (42 U.S.C. 7502(c)(6)) prohibits EPA from incorporating into a SIP "any portion of Rule 9510 that it has determined to be federally unenforceable."

Response #9: NAHB misinterprets section 172(c)(6) the Act. As cited by NAHB, section 172(c)(6) does state that SIPs "shall include enforceable emissions limitations." However, NAHB reads this language to mean that SIPs shall *only* include enforceable emissions limitations. This reading is far from correct. SIPs contain many aspects which are not federally enforceable emissions limitations. For example, approved SIPs contain such items as current emissions inventories, future emissions inventory projections based upon economic and technological trends, and air quality modeling. In addition, section 172(c)(6) expressly provides for "other control measures, means or techniques" which may not include enforceable emissions limitations. One example given in section 172(c)(6) is "economic incentives such as fees." The imposition of a fee on a polluting activity may create an incentive to minimize the resulting pollution from that activity, and the incentive might be successful in accomplishing that goal. However, imposition of the fee, in itself, in no way creates an enforceable emissions limitation.

In addition, as noted in EPA's TSD, through policies such as "Guidance for Incorporating Voluntary Mobile Source Emission Reduction Programs in State Implementation Plans (VMEP)" and "Incorporating Emerging and Voluntary Measures into a State Implementation Plan (SIP)," EPA has recognized that measures and rules which are not federally enforceable can be incorporated into a SIP pursuant to the Act in appropriate circumstances.

Finally, in evaluating rules or measures which contain novel and/or voluntary aspects, some issues regarding federal enforceability really concern the amount of emissions reductions which can be legally compelled pursuant to such a rule or measure, and, therefore, what amount of emissions reductions, if any, should be credited toward satisfying the planning requirements of section 110 of the Act. This is the case with Rule 9510. As noted by NAHB, many of the issues described in EPA's TSD concern the mechanisms created by Rule 9510 to accomplish emissions reductions. For example, a project developer subject to Rule 9510 might choose to pay fees instead of reducing emissions associated with the project site. In turn, the SJVUAPCD would use these collected fees to generate off-site emissions reductions. The SJVUAPCD's ability to require these reductions would rely on a contract between the SJVUAPCD and an off-site project applicant.

If Rule 9510 was incorporated into the SIP, EPA could use the Act's

enforcement authority to require that the appropriate fees be collected from a project developer, and that the collected fees be used by the SJVUAPCD to seek off-site emissions reductions. However, the issue of federal enforceability arises because EPA may not be able to enforce the terms of a contract between the SJVUAPCD and an off-site project applicant, and thus the emissions reductions required by that contract, pursuant to its enforcement authority under the Act. Thus the issue is not EPA's ability to enforce the provisions of Rule 9510 as they are written, but whether those provisions create adequate legal authority for EPA to require emissions reductions which are sought or claimed by the rule. In view of these enforceability concerns, among other issues, the TSD recommends approving Rule 9510 into the SIP, but also recommends that "reductions from the Rule should not be credited in any attainment and rate of progress/reasonable further progress demonstrations or used to meet contingency measure requirements until the District corrects the identified problems, which we believe the District should easily be able to do." In today's final rule we therefore approve Rule 9510 but we do not assign any emissions reduction credit to the rule for purposes of any attainment or progress demonstration in any area.

Comment #10: NAHB states that Rule 9510 is not an "incentive" program that "encourages" reductions, but rather Rule 9510 requires developers to achieve emission reductions. NAHB therefore asserts that Rule 9510 is not an economic incentive program and EPA's guidance, "*Improving Air Quality with Economic Incentive Programs*" (EIP Guidance) does not apply.

Response #10: Economic incentive programs (EIPs), as defined by EPA's EIP Guidance,[1] are programs which may include State established measures directed toward stationary, area, and/or mobile sources, to achieve emission reductions milestones to attain and maintain ambient air quality standards, and/or to provide more flexible, lower-cost approaches to meeting environmental goals. EIPs use market-based strategies to encourage reducing emissions in the most efficient manner (see EIP Guidance sections 1.1 and 15.1). While Rule 9510 requires developers subject to the rule to reduce emissions, it also provides developers the flexibility of paying a fee as an alternative means to comply. The developer may choose to pay a fee when it is a lower cost approach to meeting the rule requirements. Rule 9510 also requires SJVUAPCD to administer a program that uses these funds to achieve surplus emission reductions. Because the program as a whole includes this separate program where SJVUAPCD will use the funds to obtain emission reductions, it allows for a more flexible and potentially lower cost approach to getting emission reductions from the program. For these two reasons, Rule 9510 is an economic incentive program and EPA's EIP Guidance applies.

Comment #11: NAHB states that Rule 9510 is not a voluntary program, that it is a mandatory program. NAHB asserts that EPA's "*Guidance on Incorporating Voluntary Mobile Source Emission Reduction Programs in State Implementation Plans (VMEP)*" does not apply.

Response #11: First, we wish to clarify that EPA proposed to approve Rule 9510 because it strengthens the SIP. EPA did not propose to approve Rule 9510 as a measure under VMEP.[2] Our discussion of VMEP and the Emerging and Voluntary Measures Policy [3] was intended to provide the SJVUAPCD and the public with information concerning certain deficiencies in Rule 9510 and how these deficiencies might be addressed under the policies so that SIP emission reduction credit could be granted for the emission reductions achieved by Rule 9510. In addition, we acknowledge that we may not have made fully clear in the TSD the difference between enforceability in the context of reviewing the provisions of an individual emissions control rule as distinct from being able to assure that a state's commitment to achieve emissions reductions is fully accomplished.

The commenter is correct that entities subject to Rule 9510 are required to comply with the rule, and in that sense the provisions are mandatory. However, the commenter misunderstands the scope and potential applicability of VMEP.

VMEP defines voluntary measures as emission reduction programs that rely on voluntary actions of individuals or other parties for achieving emission reductions. However, a State's obligations with respect to VMEPs must be enforceable at the State and Federal levels. That is, under the VMEP policy guidance, the State is not responsible, necessarily, for implementing a program dependent on voluntary actions. However, the State is obligated to monitor, assess and report on the implementation of voluntary actions and the emission reductions achieved from the voluntary actions and to remedy in a timely manner emission reduction shortfalls should the voluntary measure not achieve projected emission reductions.

While the developer must comply with the rule, several of the developer's compliance options rely upon voluntary emission reductions. For instance, the developer could include on-site mitigation measures designed to reduce vehicle miles travelled by the residents. Emission reductions would occur when residents voluntarily choose to drive less. Alternatively, the developer could also pay a fee in lieu of implementing on-site mitigation measures. While the SJVUAPCD would use the funds to achieve emission reductions, the entities actually providing the emission reductions are voluntarily participating in the program and are not subject to a rule. Because some of the activities generating the actual emission reductions are voluntary, VMEP could be used to help evaluate whether SIP credit is appropriate if the deficiencies discussed in section (5)(f) of our TSD are addressed.

Comment #12: NAHB notes that EPA's guidance "*Incorporating Emerging and Voluntary Measures into a State Implementation Plan (SIP)*" (Emerging and Voluntary Measures Policy) does not apply to emissions from mobile sources. NAHB states that while EPA asserts that developers are the entities subject to the rule, developers are not the "sources" of NO_X and PM_{10} mobile source emissions. NAHB states that nonroad engines and vehicles are the "source" of emissions regulated by Section 6.1.1. NAHB therefore concludes that this policy does not apply.

Response #12: In section (5)(b)(iv) of our TSD (page 13), we discuss enforceability and how prohibitory rules typically hold "sources" of emissions legally responsible for the required emission reductions. Rule 9510 in contrast applies to developers. As the entity subject to the rule and legally responsible for the emission reductions, our reference to the developer as the "source" in Rule 9510 was shorthand to reflect their legal responsibility under Rule 9510. The commenter is correct that sources of emissions are normally

[1] EPA's EIP Guidance, "*Improving Air Quality with Economic Incentive Programs*" published on January 2001 (EPA–452/R–01–001) is available at *http://www.epa.gov/ttn/oarpg/t1/memoranda/eipfin.pdf*.

[2] A copy of VMEP (October 23, 1997) is available at *http://www.epa.gov/otaq/stateresources/policy/general/vmep-gud.pdf*.

[3] This guidance is entitled, "*Incorporating Emerging and Voluntary Measures into a State Implementation Plan (SIP),*" September 2004, and is available at *http://www.epa.gov/ttn/oarpg/t1/memoranda/evm_ievm_g.pdf*.

categorized as mobile, stationary, or area sources. However, as we described in Response #1, the CAA recognizes that development projects are "indirect sources" and can be subject to regulation in a SIP.

Development projects indirectly result in new emissions from mobile, stationary, and area sources, including those from new or longer vehicle trips, fuel combustion from stationary and area sources, use of consumer products, landscaping maintenance, and construction activities.

While the calculation of emission reductions required by Rule 9510 takes into account construction equipment emissions (Section 6.1) and operational emissions (Section 6.2), the emission reduction obligation is expressed in tons of NO_X and tons of PM_{10} without regard to whether the reductions must come from mobile, stationary, or area sources. Indeed, Section 6.3 allows the emission reduction requirement to be met through any combination of on-site measures or off-site fees.

Because the sources of emissions are mobile, stationary, and area sources and the emission reductions could come from all three types of sources, EPA has appropriately considered the guidances "*Incorporating Emerging and Voluntary Measures into a State Implementation Plan (SIP)*" which applies to stationary and area sources, and "*Guidance on Incorporating Voluntary Mobile Source Emission Reduction Programs in State Implementation Plans (VMEP)*" which applies to mobile sources. As we clarified in Response #11, the discussion in the TSD on the consideration of these policies was largely to provide the SJVUAPCD and the public with information on how rule deficiencies might be addressed in the future.

Comment #13: NAHB states that even if the Emerging and Voluntary Measures Policy applied to non-road mobile sources under Rule 9510, EPA cannot approve Rule 9510 because the non-road mobile source reductions are not permanent. The reductions are not permanent because they are not federally enforceable.

Response #13: As we stated in Responses #11 and #12, EPA did not propose to approve Rule 9510 as a measure under the Emerging and Voluntary Measures Policy, and the discussion in the TSD was largely to provide information on how rule deficiencies might be addressed in the future to obtain SIP credit for emission reductions. While thus not relevant to our action in approving Rule 9510, we will elaborate on the concept of permanent.

Whether a reduction is considered "permanent" is dependent on the duration of the obligation which the particular measure and resulting emission reductions are meant to address. The commenter has noted that EPA identified enforceability concerns with the provisions requiring implementation of the mitigation measure, and Response #9 addresses the enforceability issue. Enforceability is a separate question from whether the non-road mobile source mitigation measure, if implemented, results in permanent reductions. If a developer's mitigation measure is the use of lower emitting construction equipment, the very use of that equipment results in a stream of emission reductions during the construction phase. Although these reductions may not be federally enforceable, they can still be permanent during the relevant time period.

III. EPA Action

No comments were submitted that change our assessment that the submitted rules comply with the relevant CAA requirements. Therefore, as authorized in section 110(k)(3) of the Act, EPA is fully approving this rule into the California SIP.

IV. Statutory and Executive Order Reviews

Under the Clean Air Act, the Administrator is required to approve a SIP submission that complies with the provisions of the Act and applicable Federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to approve State choices, provided that they meet the criteria of the Clean Air Act. Accordingly, this action merely approves State law as meeting Federal requirements and does not impose additional requirements beyond those imposed by State law. For that reason, this action:

- Is not a "significant regulatory action" subject to review by the Office of Management and Budget under Executive Order 12866 (58 FR 51735, October 4, 1993);
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4);
- Does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the Clean Air Act; and
- Does not interfere with Executive Order 12898 (59 FR 7629 (Feb. 16, 1994)) because EPA lacks the discretionary authority to address environmental justice in this rulemaking.

In addition, this rule does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because the SIP is not approved to apply in Indian country located in the State, and EPA notes that it will not impose substantial direct costs on tribal governments or preempt tribal law.

The Congressional Review Act, 5 U.S.C. 801 *et seq.,* as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this action and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a "major rule" as defined by 5 U.S.C. 804(2).

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by July 8, 2011. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements (see section 307(b)(2)).

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements.

Dated: March 31, 2011.

Jared Blumenfeld,

Regional Administrator, Region IX.

Part 52, Chapter I, Title 40 of the Code of Federal Regulations is amended as follows:

PART 52—[AMENDED]

■ 1. The authority citation for Part 52 continues to read as follows:

Authority: 42 U.S.C. 7401 *et seq.*

Subpart F—California

■ 2. Section 52.220, is amended by adding paragraph (c)(348) (i)(A)(*3*) to read as follows:

§ 52.220 Identification of plan.

* * * * *

(c) * * *

(348) * * *

(i) * * *

(A) * * *

(*3*) Rule 9510, "Indirect Source Review (ISR)," adopted on December 15, 2005.

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[FR Doc. 2011–11133 Filed 5–6–11; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R09–OAR–2007–1073; FRL–9292–4]

Revisions to the California State Implementation Plan, Imperial County Air Pollution Control District (ICAPCD)

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: EPA is finalizing approval of revisions to the Imperial County Air Pollution Control District portion of the California State Implementation Plan (SIP). These revisions were proposed in the **Federal Register** on February 9, 2011 and concern New Source Review (NSR) permitting requirements and exemptions for various air pollution sources. We are approving local rules that regulate these emission sources under the Clean Air Act as amended in 1990 (CAA or the Act).

DATES: *Effective Date:* This rule is effective on June 8, 2011.

ADDRESSES: EPA has established docket number EPA–R09–OAR–2007–1073 for this action. Generally, documents in the docket for this action are available electronically at *http://www.regulations.gov* or in hard copy at EPA Region IX, 75 Hawthorne Street, San Francisco, California. While all documents in the docket are listed at *http://www.regulations.gov,* some information may be publicly available only at the hard copy location (e.g., copyrighted material, large maps, multi-volume reports), and some may not be available in either location (e.g., confidential business information (CBI)). To inspect the hard copy materials, please schedule an appointment during normal business hours with the contact listed in the **FOR FURTHER INFORMATION CONTACT** section.

FOR FURTHER INFORMATION CONTACT: Laura Yannayon, EPA Region IX, (415) 972–3534, *yannayon.laura@epa.gov.*

SUPPLEMENTARY INFORMATION: Throughout this document, "we," "us" and "our" refer to EPA.

Table of Contents

I. Proposed Action

On February 9, 2011 (76 FR 7142), EPA proposed to approve the following rules into the California SIP.

Local agency	Rule No.	Rule title	Amended	Submitted
ICAPCD	201	Permits Required	10/10/06	08/24/07
ICAPCD	202	Exemptions	10/10/06	08/24/07

We proposed to approve these rules because we determined that they complied with the relevant CAA requirements. Our proposed action contains more information on the rules and our evaluation.

II. Public Comments and EPA Responses

EPA's proposed action provided a 30-day public comment period. During this period, we received no comments.

III. EPA Action

No comments were submitted that change our assessment that the submitted rules comply with the relevant CAA requirements. Therefore, as authorized in section 110(k)(3) of the Act, EPA is fully approving these rules into the California SIP.

IV. Statutory and Executive Order Reviews

Under the Clean Air Act, the Administrator is required to approve a SIP submission that complies with the provisions of the Act and applicable Federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to approve State choices, provided that they meet the criteria of the Clean Air Act. Accordingly, this action merely approves State law as meeting Federal requirements and does not impose additional requirements beyond those imposed by State law. For that reason, this action:

- Is not a "significant regulatory action" subject to review by the Office of Management and Budget under Executive Order 12866 (58 FR 51735, October 4, 1993);
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4);
- Does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);

• Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);

• Is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the Clean Air Act; and

• Does not provide EPA with the discretionary authority to address disproportionate human health or environmental effects with practical, appropriate, and legally permissible methods under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, this rule does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because the SIP is not approved to apply in Indian country located in the State, and EPA notes that it will not impose substantial direct costs on tribal governments or preempt tribal law.

The Congressional Review Act, 5 U.S.C. 801 *et seq.,* as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this action and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a "major rule" as defined by 5 U.S.C. 804(2).

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by July 8, 2011. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements (see section 307(b)(2)).

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations, Nitrogen Dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Volatile organic compounds.

Dated: March 31, 2011.

Jared Blumenfeld,

Regional Administrator, Region IX.

Part 52, Chapter I, Title 40 of the Code of Federal Regulations is amended as follows:

PART 52—[AMENDED]

■ 1. The authority citation for Part 52 continues to read as follows:

Authority: 42 U.S.C. 7401 *et seq.*

Subpart F—California

■ 2. Section 52.220 is amended by adding paragraphs (c)(351)(i)(A)(*3*) and (c)(351) (i)(A)(*4*) to read as follows:

§ 52.220 Identification of plan.

* * * * *

(c) * * *

(351) * * *

(i) * * *

(A) * * *

(*3*) Rule 201, "Permits Required" amended on October 10, 2006.

(*4*) Rule 202, "Exemptions" amended on October 10, 2006.

* * * * *

[FR Doc. 2011–11125 Filed 5–6–11; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 272

[FRL–9293–9]

Wisconsin: Incorporation by Reference of Approved State Hazardous Waste Management Program

AGENCY: Environmental Protection Agency (EPA).

ACTION: Immediate final rule.

SUMMARY: The Resource Conservation and Recovery Act of 1976, as amended (RCRA) allows EPA to authorize States to operate their hazardous waste management programs in lieu of the Federal program. EPA uses the regulations entitled "Approved State Hazardous Waste Management Programs" to provide notice of the authorization status of State programs and to incorporate by reference those provisions of the State statutes and regulations that will be subject to EPA's inspection and enforcement. This rule codifies in the regulations the prior approval of Wisconsin's hazardous waste management program and incorporates by reference authorized provisions of the State's statutes and regulations.

DATES: This regulation is effective July 8, 2011, unless EPA receives adverse written comment on this regulation by the close of business June 8, 2011. If EPA receives such comments, it will publish a timely withdrawal of this immediate final rule in the **Federal Register** informing the public that this rule will not take effect. The incorporation by reference of authorized provisions in the Wisconsin statutes and regulations contained in this rule is approved by the Director of the Federal Register as of July 8, 2011, in accordance with 5 U.S.C. 552(a) and 1 CFR part 51.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–R05–RCRA–2010–0790 by one of the following methods:

http://www.regulations.gov: Follow the on-line instructions for submitting comments.

E-mail: gromnicki.jean@epa.gov.

Mail: Jean Gromnicki, Wisconsin Regulatory Specialist, LR–8J, U.S. EPA, Region 5, 77 West Jackson Boulevard, Chicago, Illinois 60604.

Instructions: Direct your comments to Docket ID Number EPA–R05–RCRA–2010–0790. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *http://www.regulations.gov,* including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through *http://www.regulations.gov* or e-mail. The *http://www.regulations.gov* Web site is an "anonymous access" system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through *http://www.regulations.gov,* your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters or any form of encryption, and be free of any defects or

viruses. For additional information about EPA's public docket, visit the EPA Docket Center homepage at *http://www.epagov/epahome/dockets.htm.*

Docket: All documents in the docket are listed in the www.regulations.gov index. Although listed in the index, some of the information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available either electronically in *http://www.regulations.gov* or in hard copy. You may view and copy the documents that form the basis for this codification and associated publicly available materials from 9 a.m. to 4 p.m., Monday through Friday, excluding Federal holidays, at the following address: U.S. EPA, Region 5, 77 West Jackson Boulevard, Chicago, Illinois. Interested persons wanting to examine these documents should make an appointment with Jean Gromnicki at (312) 886–6162 at least two weeks in advance.

FOR FURTHER INFORMATION CONTACT: Jean Gromnicki, Wisconsin Regulatory Specialist, U.S. EPA, Region 5, LR–8J, 77 West Jackson Boulevard, Chicago, Illinois 60604, (312) 886–6162, *e-mail: gromnicki.jean@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. Incorporation By Reference

A. What is codification?

Codification is the process of placing a State's statutes and regulations that comprise the State's authorized hazardous waste management program into the Code of Federal Regulations (CFR). Section 3006(b) of RCRA, as amended, allows EPA to authorize State hazardous waste management programs to operate in lieu of the federal hazardous waste management regulatory program.

EPA codifies its authorization of the State programs in 40 CFR part 272 and incorporates by reference State statutes and regulations that EPA will enforce under sections 3007 and 3008 of RCRA and any other applicable statutory provisions.

The incorporation by reference of State authorized programs in the CFR should substantially enhance the public's ability to discern the current status of the authorized State program and State requirements that can be federally enforced. This effort provides clear notice to the public of the scope of the authorized program in each State.

B. What is the history of the authorization and codification of Wisconsin's hazardous waste management program?

Wisconsin initially received final authorization on January 30, 1986, effective January 31, 1986 (51 FR 3783) to implement the RCRA hazardous waste management program. EPA granted authorization for changes to Wisconsin's program on May 23, 1989, effective June 6, 1989 (54 FR 15029), on November 22, 1989, effective January 22, 1990 (54 FR 48243), on April 24, 1992, effective April 24, 1992 (57 FR 15029), on June 2, 1993, effective August 2, 1993 (58 FR 31344), on August 5, 1994, effective October 4, 1994 (59 FR 39971), on August 5, 1999, effective October 4, 1999 (64 FR 42630), on June 26, 2002, effective June 26, 2002 (67 FR 43027), on April 15, 2009 (74 FR 17423) effective April 15, 2009, and on April 17, 2009 (74 FR 17785) effective April 17, 2009.

EPA first codified Wisconsin's authorized hazardous waste program on February 21, 1989, effective April 24, 1989 (54 FR 7422), and updated the codification of Wisconsin's program on March 30, 1990, effective May 29, 1990 (55 FR 11910), and September 22, 1993, effective November 22, 1993 (58 FR 49199). In this action, EPA is revising Subpart YY of 40 CFR part 272 to include the authorization revision actions effective through April 17, 2009.

C. What decisions have we made in this rule?

The purpose of today's **Federal Register** document is to codify Wisconsin's base hazardous waste management program and its revisions to that program. This codification reflects the Wisconsin hazardous waste program EPA authorized in final rules dated April 15, 2009 (74 FR 17423) and April 17, 2009 (74 FR 17785).

EPA provided notices and opportunity for comments on its decisions to authorize the Wisconsin program. EPA is not now reopening the decisions, nor requesting comments, on the Wisconsin authorizations as published in the **Federal Register** notices specified in Section B of this document.

This document incorporates by reference Wisconsin's authorized hazardous waste statutes and regulations and clarifies which provisions are included in the authorized and federally enforceable program. By codifying Wisconsin's authorized program and by amending the CFR, the public will be more easily able to discern the status of federally approved requirements of the Wisconsin hazardous waste management program.

EPA is incorporating by reference the Wisconsin authorized hazardous waste program in subpart YY of 40 CFR part 272. 40 CFR 272.2501 incorporates by reference Wisconsin's authorized hazardous waste statutes and regulations. Section 272.2501 also references the statutory provisions (including procedural and enforcement provisions) which provide the legal basis for the State's implementation of the hazardous waste management program, the Memorandum of Agreement, the Attorney General's Statements, and the Program Description, which are approved as part of the hazardous waste management program under Subtitle C of RCRA.

D. What is the effect of Wisconsin's codification on enforcement?

The EPA retains its authority under statutory provisions, including but not limited to, RCRA sections 3007, 3008, 3013, and 7003, and other applicable statutory and regulatory provisions to undertake inspections and enforcement actions and to issue orders in all authorized States. On occasion when EPA might need to undertake these actions, it will rely on Federal sanctions, Federal inspection authorities, and Federal procedures rather than any authorized State analogues to these provisions. Therefore, EPA is not incorporating by reference any such approved Wisconsin procedural and enforcement authorities. 40 CFR 272.2501(c)(2) lists the statutory provisions which provide the legal basis for the State's implementation of the hazardous waste management program, as well as those procedural and enforcement authorities that are part of the State's approved program, but these are not incorporated by reference.

E. What State provisions are not part of the codification?

The public needs to be aware that some provisions of Wisconsin's hazardous waste management program are not part of the federally authorized State program. These non-authorized provisions include:

(1) Provisions that are not part of the RCRA subtitle C program because they are "broader in scope" than RCRA subtitle C (see 40 CFR 271.1(i));

(2) Federal rules for which Wisconsin is not authorized, but which have been incorporated into the State regulations because of the way the State adopted Federal regulations by reference.

(3) Unauthorized State requirements; and

(4) State procedural and enforcement authorities which are necessary to establish the ability of the State's program to enforce compliance but which do not supplement the Federal statutory enforcement and procedural authorities.

State provisions that are "broader in scope" than the Federal program are not part of the RCRA authorized program and EPA will not enforce them. Therefore, they are not incorporated by reference in 40 CFR part 272. For reference and clarity, 40 CFR 272.2510 (c) (3) lists the Wisconsin regulatory provisions which are "broader in scope" than the Federal program and which are not part of the authorized program being incorporated by reference. "Broader in scope" provisions cannot be enforced by EPA; the State, however, may enforce such provisions under State law.

With respect to any requirement pursuant to the Hazardous and Solid Waste Amendments of 1984 (HSWA) for which the State has not yet been authorized, EPA will continue to enforce the Federal HSWA standards until the State is authorized for these provisions.

F. What will be the effect of federal HSWA requirements on the codification?

EPA is not amending 40 CFR part 272 to include HSWA requirements and prohibitions that are implemented by EPA. Section 3006(g) of RCRA provides that any HSWA requirement or prohibition (including implementing regulations) takes effect in authorized and not authorized States at the same time. A HSWA requirement or prohibition supersedes any less stringent or inconsistent State provision which may have been previously authorized by EPA (50 FR 28702, July 15, 1985). EPA has the authority to implement HSWA requirements in all States, including authorized States, until the States become authorized for such requirement or prohibition. Authorized States are required to revise their programs to adopt the HSWA requirements and prohibitions, and then to seek authorization for those revisions pursuant to 40 CFR part 271.

Instead of amending the 40 CFR part 272 every time a new HSWA provision takes effect under the authority of RCRA section 3006(g), EPA will wait until the State receives authorization for its analog to the new HSWA provision before amending the State's 40 CFR part 272 incorporation by reference. Until then, persons wanting to know whether a HSWA requirement or prohibition is in effect should refer to 40 CFR 271.1(j), as amended, which lists each such provision.

Some existing State requirements may be similar to the HSWA requirement implemented by EPA. However, until EPA authorizes those State requirements, EPA can only enforce the HSWA requirements and not the State analogs. EPA will not codify those State requirements until the State receives authorization for those requirements.

II. Administrative Requirements

1. Executive Order 18266: Regulatory Planning Review

The Office of Management and Budget has exempted this rule from its review under Executive Order 12866 (58 FR 51735, October 4, 1993) and, therefore, this action is not subject to review by OMB.

2. Paperwork Reduction Act

This rule does not impose an information collection burden under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

3. Regulatory Flexibility Act

This action authorizes State requirements for the purpose of RCRA section 3006 and imposes no additional requirements beyond those imposed by State law. Accordingly, I certify that this rule will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*).

4. Unfunded Mandates Reform Act

Because this rule approves pre-existing requirements under State law and does not impose any additional enforceable duty beyond that required by State law, it does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4).

5. Executive Order 13132: Federalism

Executive Order 13132 (64 FR 43255, August 10, 1999) does not apply to this rule because it will not have federalism implications (*i.e.,* substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government).

6. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

Executive Order 13175 (65 FR 67249, November 9, 2000) does not apply to this rule because it will not have tribal implications (*i.e.,* substantial direct effects on one or more Indian tribes, or on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes).

7. Executive Order 13045: Protection of Children From Environmental Health and Safety Risks

This rule is not subject to Executive Order 13045 (62 FR 19885, April 23, 1997), because it is not economically significant as defined in Executive Order 12866 and because EPA does not have reason to believe the environmental health or safety risks addressed by this action present a disproportionate risk to children.

8. Executive Order 13211: Actions That Significantly Affect Energy Supply, Distribution, or Use

This rule is not subject to Executive Order 13211 (66 FR 28355, May 22, 2001), because it is not a significant regulatory action as defined in Executive Order 12866.

9. National Technology Transfer Advancement Act

EPA approves State programs as long as they meet criteria required by RCRA, so it would be inconsistent with applicable law for EPA, in its review of a State program, to require the use of any particular voluntary consensus standard in place of another standard that meets requirements of RCRA. Thus, the requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) do not apply to this rule.

10. Executive Order 12988

As required by section 3 of Executive Order 12988 (61 FR 4729, February 7, 1996), in issuing this rule, EPA has taken the necessary steps to eliminate drafting errors and ambiguity, minimize potential litigation, and provide a clear legal standard for affected conduct.

11. Executive Order 12630: Evaluation of Risk and Avoidance of Unanticipated Takings

EPA has complied with Executive Order 12630 (53 FR 8859, March 18, 1988) by examining the takings implications of the rule in accordance with the Attorney General's Supplemental Guidelines for the Evaluation of Risk and Avoidance of Unanticipated Takings issued under the executive order.

12. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low Income Populations

Because this rule proposes authorization of pre-existing State rules and imposes no additional requirements beyond those imposed by State law and there are no anticipated significant adverse human health or environmental effects, the rule is not subject to Executive Order 12898 (59 FR 7629, February 16, 1994).

13. Congressional Review Act

EPA will submit a report containing this rule and other information required by the Congressional Review Act (5 U.S.C. 801 *et seq.*) to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to the publication in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a "major rule" as defined by 5 U.S.C. 804(2).

List of Subjects in 40 CFR Part 272

Environmental protection, Administrative practice and procedure, Confidential business information, Hazardous materials transportation, Hazardous waste, Indians—lands, Incorporation by reference, Intergovernmental relations, Penalties, Reporting and recordkeeping requirements.

Dated: March 24, 2011.

Susan Hedman,

Regional Administrator, Region 5.

For the reasons set forth in the preamble, 40 CFR part 272 is amended as follows:

PART 272—APPROVED STATE HAZARDOUS WASTE MANAGEMENT PROGRAMS

■ 1. The authority citation for part 272 continues to read as follows:

Authority: Secs. 2002(a), 3006, and 7004(b) of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act, as amended, 42 U.S.C. 6912(a), 6926, and 6974(b).

Subpart YY—[Amended]

■ 2. Section 272.2501 is revised to read as follows:

§ 272.2501 Wisconsin State-administered program: Final authorization.

(a) Pursuant to section 3006(b) of RCRA, 42 U.S.C. 6926(b), Wisconsin has final authorization for the following elements as submitted to EPA in Wisconsin's base program application for final authorization which was approved by EPA effective on January 31, 1986. Subsequent program revision applications were approved effective on June 6, 1989, January 22, 1990, April 24, 1992, August 2, 1993, October 4, 1994, October 4, 1999, June 26, 2002, April 15, 2009, and April 17, 2009.

(b) The State of Wisconsin has primary responsibility for enforcing its hazardous waste management program. However, EPA retains the authority to exercise its inspection and enforcement authorities in accordance with sections 3007, 3008, 3013, and 7003 of RCRA, 42 U.S.C. 6927, 6928, 6934, and 6973, and any other applicable statutory and regulatory provisions, regardless of whether the State has taken its own actions, as well as in accordance with other statutory and regulatory provisions.

(c) State Statutes and Regulations.

(1) The Wisconsin regulations referenced in paragraph (c)(1)(i) of this section are incorporated by reference as part of the hazardous waste management program under subtitle C of RCRA, 42 U.S.C. 6921 *et seq.* (See § 272.2). The director of the Federal Register approves this incorporation by reference in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. You may obtain copies of the Wisconsin regulations (Wisconsin Administrative Code) that are incorporated by reference in this paragraph from: Reference Bureau, One East Main Street, Suite 200, Madison, Wisconsin 53701–2037. You may inspect a copy at EPA Region 5, from 8 a.m. to 4 p.m., 77 West Jackson Boulevard, Chicago, Illinois, 60604, or at the National Archives and Records Administration (NARA). For more information on the availability of this material at NARA, call 202–741–6030, or go to: *http:/www.archives.gov/federal-register/cfr/ibrlocations.html.*

(i) The Binder entitled "EPA-Approved Wisconsin Department of Natural Resources Regulatory and Statutory Requirements Applicable to the Hazardous Waste Program," May 2009. Only those provisions that have been authorized by EPA are incorporated by reference. These regulatory provisions are listed in Appendix A to Part 272.

(ii) [Reserved]

(2) The following provisions provide the legal basis for the State's implementation of the hazardous waste management program, but they are not being incorporated by reference and do not replace Federal authorities: Wisconsin Statutes, Sections 13.93(2m)(b)7, 19.21, 19.31, 19.32(2) and (5), 19.35(3) and (4), 19.36, 19.37(1) and (2), 23.32(1), 101.055, 141.05(47), 227.14, 227.51, 283.01(7) and (12), 283.11, 283.21(2), 283.31, 283.33, 287.07(1m)(a) and (am), 287.15, 287.18, 287.189, 289.22(1m) and (2), 289.25–289.28, 289.30(3), 289.33(6), 289.34, 289.41(1)(a),(b), (c) and (m), (3)(a)(5), (4) and (5)(d), (6) and (7), 289.61–289.68, 289.91–289.97, 291.01(7), (17), and (21), 291.05 (1)–(7), 291.11, 291.15, 291.21, 291.23, 291.25, 291.25(4), 291.37, 291.85–291.97, 291.97(1), 292, 292.11, 295.01(2)(c), 299.45(1)(a), 803.09 and 985.05. Copies of the Wisconsin Statutes are available from: Legislative Reference Bureau, One East Main Street, Suite 200, Madison, Wisconsin 53701–2037.

(3) The following statutory and regulatory provisions are broader in scope than the Federal program, are not part of the authorized program, and are not incorporated by reference:

(i) The Wisconsin Administrative Code, 2006/2007 Edition, Sections NR 665.0071(1)(b)6, 666.900–666.905, 666.909, 666.910, 670.007, and 670.427, chapter NR 670 Appendix II: Hazardous Waste Fee Table, and section NR 673.08.

(ii) [Reserved]

(4) Memorandum of Agreement. The Memorandum of Agreement between EPA Region 5 and the State of Wisconsin (WDNR), signed by the EPA Regional Administrator on October 23, 2008, is referenced as part of the authorized hazardous waste management program under subtitle C of RCRA, 42 U.S.C. 6921 *et seq.*

(5) Statement of Legal Authority. "Attorney General's Statement for Final Authorization," signed by the Attorney General of Wisconsin on July 23, 1985, and revisions, supplements and addenda to that Statement dated December 27, 1985, June 30, 1987, July 22, 1987, March 29, 1988, December 10, 1991, February 25, 1994, April 27, 1999, September 18, 2000, and October 31, 2007 are referenced as part of the authorized hazardous waste management program under subtitle C of RCRA, 42 U.S.C. 6921 *et seq.*

(6) Program Description. The Program Description and any other materials submitted as supplements thereto are referenced as part of the authorized hazardous waste management program under subtitle C of RCRA, 42 U.S.C. 6921 *et seq.*

■ 3. Appendix A to part 272 is amended by revising the listing for Wisconsin to read as follows:

Appendix A to Part 272—State Requirements

* * * * *

Wisconsin

The regulatory provisions include: The Wisconsin Administrative Code, 2006/2007

Edition, sections NR 660.01, 660.02, 660.07, 660.10, 660.11, 660.20–660.23, 660.30–660.33, 660.40, 660.41, 661.01–661.04, 661.06–661.11, 661.20–661.24, 661.30–661.33, 661.35 and 661.38 and chapter NR 661 Appendix I, II, III, VII and VIII, sections NR 662.010–662.012, 662.020, 662.022, 662.023, 662.027, 662.030–662.034, 662.040–662.043, 662.050–662.058, 662.060, 662.070, 662.080–662.087, 662.089, 662.190–662.194, 662.220, 663.10–663.13, 663.20–663.22, 663.30, 663.31, 664.0001, 664.0003, 664.0004, 664.0010–664.0019, 664.0025, 664.0030–664.0035, 664.0037, 664.0050–664.0056, 664.0070–664.0077, 664.0090–664.0101, 664.0110–664.0120, 664.0140–664.0148, 664.0151, 664.0170–664.0179, 664.0190–664.0200, 664.0220–664.0223, 664.0226–664.0232, 664.0250–664.0259, 664.0270, 664.0300–664.0304, 664.0309, 664.0310, 664.0312–664.0317, 664.0340–664.0345, 664.0347, 664.0351, 664.0550–664.0555, 664.0570–664.0575, 664.0600–664.0603, 664.1030–664.1036, 664.1050–664.1065, 664.1080–664.1090, 664.1100–664.1102 and 664.1200–664.1202, chapter NR 664 Appendix I, IV, V and IX, sections NR 665.0001, 665.0004, 665.0010–665.0019, 665.0030–665.0035, 665.0037, 665.0050–665.0056, 665.0070–665.0077 (excluding 665.0071(1)(b)6), 665.0090–665.0094, 665.0110–665.0121, 665.0140–665.0148, 665.0170–665.0174, 665.0176–665.0178, 665.0190–665.0200, 665.0202, 665.0220–665.0226, 665.0228–665.0231, 665.0250–665.0260, 665.0270, 665.0300–665.0304, 665.0309, 665.0310, 665.0312–665.0316, 665.0340, 665.0341, 665.0345, 665.0347, 665.0351, 665.0352, 665.0370, 665.0373, 665.0375, 665.0377, 665.0381–665.0383, 665.0400–665.0406, 665.0430, 665.0440–665.0445, 665.1030–665.1035, 665.1050–665.1064, 665.1080–665.1090, 665.1100–665.1102 and 665.1200–665.1202, chapter NR 665 Appendix I, III, IV, V and VI, sections NR 666.020–666.023, 666.070, 666.080, 666.100–666.112, 666.200–666.206, 666.210, 666.220, 666.225, 666.230, 666.235, 666.240, 666.245, 666.250, 666.255, 666.260, 666.305, 666.310, 666.315, 666.320, 666.325, 666.330, 666.335, 666.340, 666.345, 666.350, 666.355, 666.360, chapter NR 666 Appendix I– IX and XI –XIII, sections NR 668.01–668.07, 668.09, 668.14, 668.30–668.46 and 668.48–668.50, chapter NR 668 Appendix III, IV, VI–IX and XI, sections NR 670.001, 670.002, 670.004, 670.005, 670.010–670.019, 670.021–670.033, 670.040–670.043, 670.050, 670.051, 670.061, 670.062, 670.065, 670.066, 670.068, 670.070–670.073, 670.079, 670.235, 670.401, 670.403–670.406, 670.408–670.412, 670.415, 670.417, and 670.431–670.433, chapter NR 670 Appendix I, sections NR 673.01–673.05, 673.09–673.20, 673.30–673.40, 673.50–673.56, 673.60–673.62, 673.70, 673.80, 673.81, 679.01, 679.10–679.12, 679.20–679.24, 679.30–679.32, 679.40–679.47, 679.50–679.67, 679.70–679.75, and 679.80–679.82.

Copies of the Wisconsin regulations that are incorporated by reference can be obtained from: Legislative Reference Bureau, One East Main Street, Suite 200, Madison, Wisconsin 53701–2037.

[FR Doc. 2011–11157 Filed 5–6–11; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 1042

Control of Emissions From New and In-Use Marine Compression-Ignition Engines and Vessels; CFR Correction

Correction

In rule correction document C1–2011–8794 appearing on page 25246 in the issue of Wednesday, May 4, 2011, make the following correction:

§ 1042.901 [Corrected]

On page 25246, in the second column, in the twenty-third through twenty-fifth lines, the equation should read:

Percent of value = [(Value after modification) − (Value before modification)] × 100% ÷ (Value after modification)

[FR Doc. C2–2011–8794 Filed 5–6–11; 8:45 am]

BILLING CODE 1505–01–D

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 1

[WC Docket No. 07–245, GN Docket No. 09–51; FCC 11–50]

A National Broadband Plan for Our Future

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: In this document, the Commission revises its pole attachment rules to promote competition and to reduce the potentially excessive costs of deploying telecommunications, cable, and broadband networks. The Commission also revises the telecommunications rate formula for pole attachments consistent with the statutory framework, reinterprets the Communications Act of 1934, as amended, to allow incumbent LECs to file complaints before the Commission if they believe a pole attachment rate, term, or condition is unjust and unreasonable, and confirms wireless providers are entitled to the same rate as other telecommunications carriers. In addition, the Commission resolves multiple petitions for reconsideration and addresses various points regarding the nondiscriminatory use of attachment techniques.

DATES: Effective June 8, 2011, except for §§ 1.1420, 1.1422 and 1.1424, which contain information collection requirements that have not been approved by the Office of Management and Budget. The Commission will publish a document in the **Federal Register** announcing the effective date for those sections.

ADDRESSES: Federal Communications Commission, 445 12th Street, SW., Washington, DC 20554. In addition to filing comments with the Office of the Secretary, a copy of any comments on the Paperwork Reduction Act information collection requirements contained herein should be submitted to Judith B. Herman, Federal Communications Commission, Room 1–B441, 445 12th Street, SW., Washington, DC 20554, or via the Internet to *PRA@fcc.gov.*

FOR FURTHER INFORMATION CONTACT: Jonathan Reel, Wireline Competition Bureau, Competition Policy Division, 202–418–1580. For additional information concerning the Paperwork Reduction Act information collection requirements contained in this document, send an e-mail to *PRA@fcc.gov* or contact Judith B. Herman at 202–418–0214.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's *Report and Order and Order on Reconsideration* (Order), FCC 11–50, adopted and released on April 7, 2011. The full text of the Order is available for inspection and copying during regular business hours in the FCC Reference Center, 445 Twelfth Street, SW., Room CY–A257, Portals II, Washington, DC 20554, and may also be purchased from the Commission's copy contractor, BCPI, Inc., Portals II, 445 Twelfth Street, SW., Room CY–B402, Washington, DC 20554. Customers may contact BCPI, Inc. via their Web site, *http://www.bcpi.com,* or call 1–800–378–3160. This document is available in alternative formats (computer diskette, large print, audio record, and braille). Persons with disabilities who need documents in these formats may contact the FCC by e-mail: *FCC504@fcc.gov* or phone: 202–418–0530 or TTY: 202–418–0432.

Synopsis of Report and Order and Order on Reconsideration

1. In 1978, Congress added section 224 to the Communications Act of 1934, as amended (Communications Act or Act) thereby directing the Commission to ensure that the rates, terms, and conditions for pole attachments by cable television systems are just and reasonable. Section 224 provides that the Commission will regulate pole attachments except where such matters are regulated by a state. Section 224 also withholds from the Commission jurisdiction to regulate attachments

where the utility is a railroad, cooperatively organized, or owned by a government entity.

2. The Telecommunications Act of 1996 (1996 Act) expanded the definition of pole attachments to include attachments by providers of telecommunications service, and granted both cable systems and telecommunications carriers an affirmative right of nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by a utility. However, the 1996 Act permits utilities to deny access where there is insufficient capacity and for reasons of safety, reliability or generally applicable engineering purposes. Besides establishing a right of access, the 1996 Act set forth section 224(e) — a rate methodology for "attachments used by telecommunications carriers to provide telecommunications services" — in addition to the existing methodology in section 224(d) for attachments "used by a cable television system solely to provide cable service."

3. The Commission implemented the new section 224 access requirements in the *Local Competition Order* (47 FR 47283, Sept. 6, 1996, FCC 96–333, rel. Aug. 8, 1996). At that time, the Commission concluded that it would determine the reasonableness of a particular condition of access on a case-by-case basis. Finding that no single set of rules could take into account all attachment issues, the Commission specifically declined to adopt the National Electrical Safety Code (NESC) in lieu of access rules. The Commission also recognized that utilities typically develop individual standards and incorporate them into pole attachment agreements, and that, in some cases, Federal, state, or local laws also impose relevant restrictions. The *Local Competition Order* acknowledged concerns that utilities might deny access unreasonably, but, rather than adopt a set of substantive engineering standards, the Commission decided that procedures for requiring utilities to justify the conditions they placed on access would best safeguard attachers' rights. The Commission did adopt five rules of general applicability and several broad policy guidelines in the *Local Competition Order.* The Commission also stated that it would monitor the effect of the case-specific approach, and would propose specific rules at a later date if conditions warranted.

4. In the *1998 Implementation Order* (63 FR 12013, Mar. 12, 1998, FCC 98–20, rel. Feb. 6, 1998), the Commission adopted rules implementing the 1996 Act's new pole attachment rate formula for telecommunications carriers. The Commission also concluded that cable television systems offering both cable and Internet access service should continue to pay the cable rate. The Commission further held that wireless carriers had a statutory right of nondiscriminatory access to poles. Although the latter two determinations were challenged, both were ultimately upheld by the Supreme Court. In particular, the Court held that section 224 gives the Commission broad authority to adopt just and reasonable rates. The Court also deferred to the Commission's conclusion that wireless carriers are entitled by section 224 to attach facilities to poles.

5. On November 20, 2007, the Commission issued the *Pole Attachment NPRM* (73 FR 6879, Feb. 6, 2008, FCC 07–187, rel. Nov. 20, 2007) in recognition of the importance of pole attachments to the deployment of communications networks, in part in response to petitions for rulemaking from USTelecom and Fibertech Networks. USTelecom argued that incumbent LECs, as providers of telecommunications service, are entitled to just and reasonable pole attachment rates, terms, and conditions of attachment even though, under section 224, they are not included in the term "telecommunications carriers" and therefore have no statutory right of access. Fibertech petitioned the Commission to initiate a rulemaking to set access standards for pole attachments, including standards for timely performance of make-ready work, use of boxing and extension arms, and use of qualified third-party contract workers, among other concerns. The *Pole Attachment NPRM* sought comment on the concerns raised by USTelecom and Fibertech, as well as the application of the telecommunications rate to wireless pole attachments and other pole access concerns.

6. The American Recovery and Reinvestment Act of 2009 included a requirement that the Commission develop a national broadband plan to ensure that every American has access to broadband capability. On March 16, 2010, the National Broadband Plan was released, and identified access to rights-of-way—including access to poles—as having a significant impact on the deployment of broadband networks. Accordingly, the Plan included several recommendations regarding pole attachment access, enforcement, and pricing policies to further advance broadband deployment.

7. On May 20, 2010, the Commission issued the *Pole Attachment Order and FNPRM.* In the *2010 Order* (75 FR 45494, Aug. 3, 2010, FCC 10–84, rel. May 20, 2010), the Commission took initial steps to clarify the rules governing pole attachments and to streamline the pole attachment process. The Commission clarified the statutory right of communications providers to use the same space- and cost-saving techniques that pole owners use, such as placing attachments on both sides of a pole (boxing), and established that providers have a statutory right to timely access to poles. In the *FNPRM* (75 FR 41338, July 15, 2010, FCC 10–84, rel. May 20, 2010), the Commission sought comment on a variety of measures to speed access to poles. The Commission proposed a comprehensive timeline for all wired pole attachment requests and sought comment on possible adjustments to that timeline. The Commission sought comment on whether to adopt a separate timeline for wireless attachments. The Commission proposed to permit attachers to use independent contractors to perform surveys and make-ready work if the pole owner missed its deadlines, subject to certain conditions. The Commission further proposed that utilities may deny access by contractors to work among the electric lines. In addition, the Commission proposed a staggered payment system for make-ready work; proposed requiring a schedule of make-ready charges; proposed requiring joint pole owners to designate a single managing utility; and sought comment on improving the collection and availability of data.

8. The Commission also sought comment on whether current rules governing pole attachment complaints create appropriate incentives for parties to settle or resolve disputes informally, and whether appropriate remedies are available when parties pursue formal complaints. The *FNPRM* sought comment on ways to reduce the existing disparities in pole rental rates and proposed to address those disparities by reinterpreting the telecom rate formula and by considering the issues surrounding possible regulation of pole attachments by incumbent local exchange carriers (LECs).

9. On September 2, 2010, various electric utilities and cable providers filed petitions seeking clarification or reconsideration of parts of the *2010 Order* concerning the nondiscriminatory use of attachment techniques. The petitions ask the Commission to clarify, among other things, whether a utility must allow attachers to use the same attachment techniques that it uses for itself in the electric space, and whether a pole owner is free to impose new boxing and extension arm requirements going forward.

10. The Commission has held workshops addressing pole attachment issues. On September 28, 2010 the Wireline Competition Bureau convened a workshop to "learn from the experiences and insights of state regulators regarding the Commission's proposed pole attachment regulations." On February 9, 2011, the Commission held a Broadband Acceleration Conference that brought together leaders from Federal, state, and local governments; broadband providers; telecommunications carriers; tower companies; equipment suppliers; and utility companies to identify opportunities to reduce regulatory and other barriers to broadband build-out. At this conference, the Commission announced its Broadband Acceleration Initiative: an agenda for work inside the Commission, with our partners in Tribal, state, and local government, and with the private sector to reduce barriers to broadband deployment.

Improved Access to Utility Poles

11. We take several steps to improve access to utility poles. Our rules are generally consistent with proposals in the *FNPRM,* but also reflect a close examination of the record developed in this proceeding. We adopt a four-stage timeline that provides a maximum of 148 days for attachers to access the communications space on utility poles. For wireless attachments above the communications space, we adopt a modified form of the timeline. The timeline begins to run after the requester submits a complete application. We also establish that a utility may stop the clock for emergencies pursuant to a "good and sufficient cause" standard. We adopt rules that allow attachers to use independent contractors pre-authorized by the utilities to complete survey and make-ready work in the communications space, subject to a number of protections and conditions, if the pole owner does not meet the prescribed timelines. In particular, electric utilities have ultimate decision-making authority regarding the contractor's work with respect to section 224(f)(2) denial-of-access issues.

12. We allow a utility to limit on a per-state basis the size of a pole attachment request that is subject to the timeline, and allow extra time for large orders. Specifically, we apply the basic timeline to requests of up to 300 pole attachments per state or attachments to 0.5 percent of the utility's in-state poles, whichever is less. For larger requests of up to 3,000 pole attachments per state or 5 percent of the utility's in-state poles, whichever is less, additional time is provided for survey and make-ready. Utilities may treat multiple in-state requests from a single attacher during a 30-day period as one request. Our rules further provide that any denial of a request to attach must cite with specificity the particular safety, reliability, engineering, or other valid concern that is the basis for denial. We clarify that blanket prohibitions on pole top access are not permitted. And, as noted elsewhere in the Order, we encourage a high degree of pre-planning and coordination between attachers and pole owners, to begin as early in the process as possible.

13. We decline to adopt several proposals set forth in the *FNPRM* or that commenters recommend, and explain those decisions. For example, we determine that the timeline will provide adequate incentives for joint owners of poles to coordinate, and thus do not require joint owners to name a single management entity. We also conclude that several subsections of section 224 provide the Commission with sufficient authority to adopt a timeline and other access rules.

A. Timeline for Section 224 Access.

14. For most attachments, the total time from submission of the request through completion of make-ready should take between 105 and 148 days, depending on how long the parties take to prepare and accept an estimate. Attachers may hire contractors authorized by the utility to complete make-ready either on the 133rd or 148th day, depending on whether an owner timely notifies the attacher that it intends to move existing facilities and conduct make-ready if existing attachers have failed to move their attachments. Although we establish this timeline as a maximum, we recognize that the necessary work can often proceed more rapidly, especially at the estimate and acceptance stages, or for relatively routine requests. It would not be reasonable behavior for a utility to take longer to fulfill any requests simply because a timeline with maximum timeframes is being adopted. Likewise, for large orders, we allow 15 more days for the survey and 45 more days to complete make-ready.

15. *Stage 1—Survey:* 45 days. We require a utility to respond within 45 days of receipt of a complete application to attach facilities on the utility's poles—for both wireline and wireless attachments either in or above the communications space. This required response is specified in our current 45-day response rule, which provides that, where a utility denies an attachment request, it must provide a written explanation of its denial that is specific; include all supporting evidence and information; and explain how the evidence and information relate to reasons of lack of capacity, safety, reliability, or engineering standards. The 45-day period also accords with the "survey" period in some state models and a proposal in the record. Indeed, the *FNPRM* stated that "[the 45-day response] rule is functionally identical to a requirement for a survey and engineering analysis when applied to wired facilities, and is generally understood by utilities as such." No commenter disagrees, and most utilities regularly meet this deadline. According to a Utilities Telecom Council survey of its members, utilities meet the 45-day requirement 81 percent of the time. More than half of the missed deadlines are caused by either the size of the project or errors in the application. Our new rules address both of these problems: under the rules we adopt today the timeline does not start until a completed application is submitted, and there is flexibility for larger orders. Thus, we expect that utilities acting diligently and in good faith will be able to conduct surveys within the prescribed 45-day period. Owners are given an additional 15 days for large orders.

16. To constitute a "request for access" necessary to trigger the timeline, a requester must submit a complete application that provides the utility with the information necessary under its procedures to begin to survey the poles. We find that pole owners must timely notify attachers of errors in an application, and may not stop the clock to correct errors in an application once it is accepted as complete, as surveys that are not interrupted are more conducive to dependable timeframes. Furthermore, the timing of any such notification of deficiencies in an application must be reasonable. If the request involves attachment of facilities that are unfamiliar to the utility, engineering specifications must be established prior to submission of the application. If an application is submitted for which such engineering specifications have not been established, the pole owner must respond in a manner that is reasonable and timely under the circumstances, but in any event within 45 days. We leave the specific processes for establishing such engineering specifications to individual utilities, so long as they are reasonable and timely.

17. *Stages 2 and 3—Estimate and Acceptance:* Where a request for access is not denied, a utility must present to a requesting entity an estimate of charges to perform all necessary make-

ready work within 14 days of providing its Stage 1 response—or within 14 days after the requesting entity delivers its own survey to the pole owner, as it may do if the pole owner fails to meet the timeline's Stage 1 deadline. The requesting entity may consider the estimate for 14 days after receiving it before the utility may withdraw the offer. Both offer and acceptance may be made sooner than the maximum 14 days. Estimates will not expire automatically after 14 days, but rather must be actively withdrawn by the utility. If an estimate is withdrawn by the utility, the prospective attacher must resubmit its application for attachment.

18. *Stage 4—Make-Ready:* Upon receipt of payment from the attacher, we require a utility to notify immediately and in writing all known entities with existing attachments that may be affected by the planned make-ready. The notice shall: (1) Specify where and what make-ready will be performed; (2) set a date for completion of make-ready no later than 60 days after notification (or 105 days after notification in the case of larger orders) for attachments in the communications space, or no later than 90 days after notification (or 135 days after notification in the case of larger orders) for wireless attachments above the communications space; (3) state that any entity with an existing attachment may add to or modify the attachment before the date set for completion of make-ready; (4) state that the utility may assert its right to 15 additional days to complete make-ready and that, for attachment in the communications space, the requesting entity may complete the specified make-ready itself if make-ready is not completed by the date set by the utility (or, if the utility has asserted its 15-day right of control, by the date 15 days after that completion date); and (5) state the name, telephone number, and e-mail address of a person to contact for more information about the make-ready procedure. Under normal circumstances, performance of make-ready will complete the elements of the timeline that precede actual attachment.

19. For wireless attachments above the communications space on a pole, we include an extra 30 days for make-ready for two reasons. First, these attachments generally are located in, near or above the electric space, which can raise significant safety concerns. Second, the record reflects that, at present, there is less experience with application of state timelines to attachments at the pole top, and in those circumstances, it is appropriate to err on the side of caution. Also, we follow state models that allow additional days for make-ready for large orders within a single state.

20. *Completion by Owner:* If make-ready is not completed by the date specified in the utility's notice to entities with existing attachments, a utility, prior to the expiration of the 60-day notice period (or 105-day notice period in the case of larger orders), may notify the requesting attacher in writing that it intends to assert its right to complete all remaining work within 15 days. In such cases, the utility will have an additional 15 days to complete make-ready. If make-ready remains unfinished at the end of the 15-day extension, the attacher may assume control of make-ready at that point (Day 148 of the timeline, or Day 193 in the case of larger orders). Thus, we permit a pole owner to assert its right to 15 days to complete make-ready in lieu of adopting an automatic fifth stage for "multi-party coordination" as proposed in the *FNPRM.* For attachments in the communications space, if the utility does not timely assert its right to 15 extra days to perform make-ready, control of the project transfers to the new attacher immediately at the end of the 60-day period (or 105-day period in the case of larger orders), and the attacher may use a contractor to complete make-ready.

21. *Scope of the Timeline.* The timeline we adopted—which is modeled after the timeline that has been in use in Utah—applies to all requests by telecommunications carriers (including wireless) and cable operators for attachment in the communications space on a pole. The timeline begins when an application is complete, such that the utility has been provided with the information necessary under its procedures to begin to survey the requested pole(s), including developed engineering specifications for the particular equipment to be attached. A modified form of the timeline applies to wireless attachments by telecommunications carriers and cable operators that are made above the communications space. The timeline does not apply to section 224 ducts, conduits, or rights-of-way. We affirm that completion of an initial pole attachment agreement or "master agreement" is not a prerequisite to starting the clock on a completed application, which may have multiple attachment requests within it. Applications that are outside the scope of the timeline remain subject to the general requirement that the pole owner provide a specific written response within 45 days.

22. *Remedy: Utility-Approved Contractors.* Requesters need a way to obtain access to poles if a utility does not meet the deadlines we impose. We adopt the proposal in the *FNPRM* and hold that, if a utility does not meet the deadline to complete a survey or make-ready established in the timeline, an attacher may hire contractors to complete the work in the communications space. We require each utility to make available a reasonably sufficient list of contractors that it authorizes to perform surveys or make-ready on its poles, and require that the attacher must use contractors from this list. We also seek to ensure that safety and network integrity are preserved at all costs. Thus, we require attachers that hire contractors to perform survey and make-ready work to provide a utility with an opportunity for a utility representative to accompany and consult with the attacher and its contractor prior to commencement of any make-ready work by the contractor. Consulting electric utilities are entitled to make final determinations in case of disputes over capacity, safety, reliability, and generally applicable engineering purposes.

23. *Limit on Order Size.* Based on the record before us and successful state models, we adopt limits on the size of attachment requests that are subject to the timelines we adopt today. The limits on size of attachment requests apply both to attachments in the communications space and the longer timeline for wireless attachments above the communications space. Specifically, we apply the timeline to orders up to the lesser of 0.5 percent of the utility's total poles within a state or 300 poles within a state during any 30-day period. For larger orders—up to the lesser of 5 percent of a utility's total poles in a state or 3,000 poles within a state—we add 15 days to the timeline's survey period and 45 days to the timeline's make-ready period, for a total of 60 days. For in-state orders greater than 3,000 poles, we require parties to negotiate in good faith regarding the timeframe for completing the job. An attacher always has the ability to submit requests of up to 3,000 poles in any 30-day period, so an attacher could start a 9,000 pole order within a single state through the timeline over three successive months.

24. *Stopping the Clock.* Emergencies and certain events during the make-ready phase that are beyond a utility's control may legitimately interrupt pole attachment projects, and the *FNPRM* sought comment on how best to reconcile the timeline with this reality. We adopt a "good and sufficient cause" standard under which a utility may toll the timeline for no longer than necessary where conditions render it

infeasible to complete the make-ready work within the prescribed timeframe. A utility must exercise its judgment in invoking a clock stoppage in the context of its general duty to provide timely and nondiscriminatory access, and an attacher may challenge a utility's failure to either meet its deadline or surrender control of make-ready if a clock stoppage is not justified by good and sufficient cause.

B. Wireless

25. *Specificity of Denials.* We clarify that, regardless of whether a utility has a master agreement with a wireless carrier, the specificity requirement of § 1.1403(b) of the Commission's rules applies to all denials of requests for access. The Commission's rules require that, when a utility denies a request for access, it must state with specificity its reasons for doing so. Section 1.1403(b) of the Commission's rules requires that denials of access be confirmed in writing within 45 days of the request. The utility also "shall be *specific,* shall include all relevant evidence and information supporting its denial, and shall explain how such evidence and information relate to a denial of access for reasons of lack of capacity, safety, reliability or engineering standards." In the *FNPRM,* the Commission proposed that, where a utility has no master agreement with a carrier for wireless attachments requested, the utility may satisfy the requirement to respond with a written explanation of its concerns with regard to capacity, safety, reliability, or engineering standards.

26. *Pole Tops.* We clarify that section 224 allows wireless attachers to access the space above what has traditionally been referred to as "communications space" on a pole. On previous occasions, the Commission has declined to establish a presumption that this space may be reserved for utility use only, and has stated that the only recognized limits to access for antenna placement are those contained in the statute. Yet wireless attachers assert that pole top access is persistently challenged by pole owners, who often impose blanket prohibitions on attaching to some or all pole tops. Blanket prohibitions are not permitted under the Commission's rules. We reject the assertions of some utilities that our rule regarding pole tops will create a "*de facto* presumption in favor of pole top attachments" or otherwise "restrict an electric utility's right to deny access for reasons of safety and reliability." Instead, we clarify that a wireless carrier's right to attach to pole tops is the same as it is to attach to any other part of a pole. Utilities may deny access "where there is insufficient capacity, and for reasons of safety, reliability, and generally applicable engineering purposes." The record in this proceeding is replete with examples of various types of pole top attachments that have been successfully accommodated, both for wireless attachers and for the utilities themselves.

C. Use of Contractors for Attachment

27. As proposed in the *FNPRM,* we resolve an ambiguity in the Commission's rules regarding the use of contractors to attach facilities "in the proximity of electric lines" after make-ready has been completed and attachment permits issued. Specifically, we clarify that "proximity of electric lines" in this context includes work that extends into the safety space that separates the communications space from the electric space, but does not include work among the power lines. While an attacher may use a contractor to attach a wireless antenna above the communications space and associated safety space, we find that an attacher may only use a contractor that has the proper qualifications and that the utility has approved to perform such work. Utilities are not required to keep a separate list of contractors for this purpose, but must be reasonable in approving or disapproving contractors. Accordingly, the standard for attachment by a contractor in the communications space remains that of the "same qualifications" as the utility, but any attachment in the electric space must be at the higher utility-approved standard.

D. Joint Ownership

28. In the *FNPRM,* we proposed to require owners to consolidate authority in one managing utility when more than one utility owns a pole and to make the identity of this managing utility publicly available. We decline to adopt the proposed rules relating to joint ownership, but we clarify and emphasize that we expect joint owners to coordinate and cooperate with each other and with requesting attachers consistent with pole owners' duty to provide just and reasonable access.

E. Legal Authority

29. We conclude that section 224 authorizes the Commission to promulgate the access rules we adopted, including the timeline and its self-effectuating remedy for failure to meet the timeline in the communications space. Through section 224(b)(1), Congress explicitly delegated authority to the Commission to "regulate the rates, terms, and conditions for pole attachments," as well as to develop procedures necessary for resolving complaints arising under the Commission's substantive regulations, and to fashion appropriate remedies. In addition, section 224(b)(2) directs the Commission to make rules to carry out the provisions of this section. Congress also gave more specific substantive guidance for access to poles in section 224(f): "just and reasonable" access must also be "nondiscriminatory."

Improving the Enforcement Process

30. *Revising Pole Attachment Dispute Resolution Procedures.* In the *FNPRM,* we sought comment on whether the Commission should modify its existing procedural rules governing pole attachment complaints. Several commenters expressed the view that new procedures and processes are not needed or that existing procedures can be improved to address any problems. Similarly, there was little discussion of, or support for, the formation of specialized forums to address enforcement issues. A number of commenters, however, maintained that the Commission should do more to encourage parties to resolve their disputes themselves prior to filing a complaint with the Commission.

31. We agree that parties ought to make every effort to settle their disputes informally before instituting formal processes at the Commission. Section 1.1404(k) of the Commission's rules requires a complainant to "include a brief summary of all steps taken to resolve the problem before filing," and, if no such steps were taken, to "state the reason(s) why it believed such steps were fruitless." In our view, however, that rule does not adequately ensure that the parties will engage in serious efforts to resolve disputes prior to the initiation of litigation. We believe a requirement similar to that imposed by the California Public Utility Commission, requiring "executive-level" discussions, should be incorporated into the Commission's rules. We therefore revise Commission rule § 1.1404(k) to require that there be "executive-level discussions" (*i.e.,* discussions among individuals who have sufficient authority to make binding decisions on behalf of the company they represent), preferably face-to-face, prior to the filing of a complaint at the Commission. We will consider in any enforcement proceedings whether such coordination has taken place.

32. In addition, a number of commenters expressed concern about the length of time it takes for the Commission to resolve pole attachment complaints. We believe that the new

processes adopted elsewhere in the Order will have the effect of expediting the pole access process. And, to the extent that access disputes remain a problem, we will make every effort to resolve them expeditiously. We do not believe that other substantial changes, such as new procedures or specialized forums, are justified at this time.

33. *Efficient Informal Dispute Resolution Process.* The *FNPRM* sought comment on whether the Commission should attempt to encourage "local dispute resolution," and several commenters endorsed the notion. We agree, and believe that it is desirable for parties to include dispute resolution procedures in their pole attachment agreements. Any refusal to enter into an agreement because it contains a dispute resolution provision would be considered unreasonable. We suggest that issues to be addressed specifically in a dispute resolution provision might include the requirement of executive-level settlement negotiations, and reliance on a forum other than the Commission (*e.g.,* an arbitrator or expert panel) to resolve disputes. We also note that the Commission's pre-complaint mediation process has had marked success in helping parties resolve pole attachment disputes, and we encourage parties to utilize that process.

34. This Order also concludes, as proposed in the *FNPRM,* that the portion of the Commission's rules § 1.1404(m) that provides that potential attachers who are denied access to a pole, duct, or conduit must file a complaint "within 30 days of such denial" should be eliminated. We believe the 30-day rule no longer serves a useful purpose, and is actually counterproductive at times. Any concern about stale complaints is addressed by our modifications of the Commission's rules § 1.1410, which state that remedies must be "consistent with the applicable statute of limitations." We therefore eliminate the portion of the Commission's rules § 1.1404(m) requiring that denial of access complaints be filed within 30 days.

35. *Remedies.* The *FNPRM* proposed to amend § 1.1410 of the Commission's pole attachment complaint rules to enumerate the remedies available to an attacher that proves a utility has unlawfully delayed or denied access to its poles, simply codifying the existing authority and practice, and we accordingly adopt the rule change as proposed. The *FNPRM* also proposed to amend the Commission's rules § 1.1410 to specify that compensatory damages may be awarded where an unlawful denial or delay of access is established, or a rate, term, or condition is found to be unjust and unreasonable. After reviewing voluminous and sharply divided comments on this question, we decline, at this time, to amend the Commission's rules § 1.1410 to allow compensatory damages. Given all of the rules designed to improve and expedite pole access that we adopt herein, we anticipate that attachers will experience far fewer difficulties than they have to date.

36. We also adopt the proposed modification of the Commission's rules § 1.1410(c), which permits a monetary award in the form of a "refund or payment," measured "from the date that the complaint, as acceptable, was filed, plus interest." We believe that this modification, which will allow monetary recovery in a pole attachment action to extend back as far as the applicable statute of limitations, will make injured attachers whole, and will be consistent with the way that claims for monetary recovery are generally treated under the law. It will also remove the perceived impediment to pre-complaint negotiations between the parties to resolve disputes about rates, terms and conditions of attachment. We reject the contention that the proposed rule change creates an incentive for attaching entities to attempt to maximize their monetary recovery by waiting until shortly before the statute of limitations has expired to bring a dispute over rates to the Commission.

37. *Unauthorized Attachments.* In modifying our rules regarding penalties for unauthorized attachments, we acknowledge the wide range of opinions among commenters regarding the scope of the problem posed by unauthorized attachments. Although the record is insufficient for us to make specific findings regarding the scope and severity of non-compliance, there appears to be a well-founded concern that the current unauthorized attachment regime (*i.e.,* the *Mile Hi* case), which involves payment amounting to no more than back rent, provides little incentive for attachers to follow authorization processes, and that competitive pressure to bring services to market overwhelms any deterrent effect. That said, we take seriously the arguments by attachers that utilities may deem attachments to be unauthorized because of poor record keeping or changes in pole ownership, rather than because of the attacher's failure to follow proper protocol. Consequently, the policy we enunciate today applies on a prospective basis only—*i.e.,* to new agreements, or amendments to existing agreements, executed after the effective date of this Order.

38. To address the concerns implicated by unauthorized attachments, we explicitly abandon the *Mile Hi* limitation on penalties and instead create a safe harbor for more substantial penalties. Specifically, going forward, we will consider contract-based penalties for unauthorized attachments to be presumptively reasonable if they do not exceed those implemented by the Oregon PUC. Oregon has established a multifaceted system that contains, among others, the following provisions:

- An unauthorized attachment fee of $500 per pole for pole occupants without a contract (*i.e.,* when there is no pole attachment agreement between the parties);
- An unauthorized attachment fee of five times the current annual rental fee per pole if the pole occupant does not have a permit and the violation is self-reported or discovered through a joint inspection, with an additional sanction of $100 per pole if the violation is found by the pole owner in an inspection in which the pole occupant has declined to participate.
- A requirement that the pole owner provide specific notice of a violation (including pole number and location) before seeking relief against a pole occupant.
- An opportunity for attachers to avoid sanctions by submitting plans of correction within 60 calendar days of receipt of notification of a violation or by correcting the violation and providing notice of the correction to the owner within 180 calendar days of receipt of notification of the violation.
- A mutual obligation of pole owners and pole occupants to correct immediately violations that pose imminent danger to life or property. If a party corrects another party's violation, the party responsible for the violation must reimburse the correcting party for the actual cost of corrections.
- The opportunity for resolution of factual disputes via settlement conferences before an alternative dispute resolution forum.

39. In a case where an attacher makes unauthorized attachments to a pole at a time when the attacher has no pole attachment agreement with the utility, but later enters into such an agreement, we find that it would be reasonable for the utility to apply the unauthorized attachment provisions in that agreement to attachments that were made before the agreement was executed, as well as to any unauthorized attachments made following execution. If an attacher who has made unauthorized attachments without any contract with the utility refuses to enter into a pole attachment

agreement, the utility may seek other remedies including, for example, an action in state court for trespass.

40. We do not adopt the Oregon system as Federal law, but rather continue to favor agreements negotiated between utilities and attaching entities. We simply conclude that we have examined Oregon's rules and find them to be reasonable, and that we would expect to find reasonable any unauthorized attachment provisions contained in agreements that do not exceed the Oregon penalties. As noted above, however, the Oregon sanctions are part of a larger system that also affords protections to attachers that operate in good faith. Consequently, we anticipate that, like the Oregon system, a reasonable pole attachment agreement also will contain provisions that provide notice to attachers, a fair opportunity to remedy violations, and a reasonable process for resolving factual disputes that may arise.

41. *The* "*Sign and Sue*" *Rule.* Our review of the comments responding to the *FNPRM*'s proposal to revise the Commission's long-standing "sign and sue" rule, which allows an attacher to challenge the lawfulness of terms in an executed pole attachment agreement that the attacher claims it was coerced to accept in order to gain access to utility poles, persuades us that the Commission should not amend § 1.1404(d) of the Commission's rules to add a notice requirement to the "sign and sue" rule. Such a requirement poses a significant risk of unduly delaying the negotiation process and adding unnecessary complexity to the adjudication of pole attachment disputes before the Commission. Moreover, we find that a number of the intended benefits of the proposed notice provision will be realized through the amendment to the Commission's rules § 1.1404(k), requiring executive-level discussions between the parties.

Pole Rental Rates

42. In the *FNPRM,* the Commission sought to limit the distortions present in the current pole rental rates "to increase the availability of, and competition for, advanced services to anchor institutions and as middle-mile inputs to wireless services and other broadband services," some of which potentially could be classified as telecommunications services. Accordingly, the Commission sought comment on alternative approaches for reinterpreting the telecom rate formula within the existing statutory framework, including a specific Commission proposal based on elements proposed by TW Telecom (TWTC). This approach was consistent with the National Broadband Plan's recommendation to establish rates "as low and close to uniform as possible" based on evidence that the uncertainty regarding the applicable rate "may be deterring broadband providers that pay lower pole rates from extending their networks or adding capabilities (such as high-capacity links to wireless towers)." This uncertainty results from the risk that, by offering services that potentially could be classified as "telecommunications services," a higher telecom rental rate might then be applied to the broadband provider's entire network.

A. The New Telecom Pole Rental Rate

43. The Commission adopts a modified form of the *FNPRM's* proposal as the new telecom rate. The new telecom rate generally will recover the same portion of pole costs as the current cable rate, is fully compensatory, and is grounded in sound economic policies. Accordingly, the new rate will minimize the difference in rental rates paid for attachments that are used to provide voice, data, and video services, and thus will help remove market distortions that affect attachers' deployment decisions. Removing these barriers to telecommunications and cable deployment will enable consumers to benefit through increased competition, affordability, and availability of advanced communications services, including broadband.

44. The Order reinterprets the telecommunications rate formula for pole attachments consistent with its authority and the existing statutory framework. The Commission identifies a range of possible rates consistent with section 224(e), from the current application of the telecom rate formula based on fully allocated costs at the upper end, to an alternative application of the telecom rate formula based on cost causation principles that results in a rate closer to incremental costs at the lower end. Within that range, Commission seeks to balance the goals of promoting broadband and other communications services with the historical role that pole rental rates have played in supporting the investment in pole infrastructure, and thus define the ambiguous statutory term "cost of providing space" on that basis.

45. *Upper-Bound Rate.* To begin identifying the range of reasonable rates that could result from the telecom rate formula, we first identify the present telecom rate as a reasonable upper bound. The Commission's current telecom rate formula is based on a fully allocated cost methodology, which recovers costs that the pole owner incurs regardless of the presence of attachments. It includes a full range of costs, some of which do not directly relate to or vary with the presence of pole attachments.

46. *Lower-Bound Rate.* As the Commission observed in the *FNPRM,* "a rate that covers the pole owners' incremental cost associated with attachment would, in principle, provide a reasonable lower limit." However, the section 224(e) formulas allocate the relevant costs in such a way that simply defining "cost" as equal to incremental cost, as TWTC initially proposed, would result in pole rental rates *below* incremental cost.

47. Thus, to identify a lower-bound rate that is consistent with this statutory framework—and enables costs to be allocated based on the prescribed cost-apportionment formulas—the Commission relies on the basic principles of cost causation that would underlie a marginal cost rate without defining "cost" as equivalent to marginal or incremental cost *per se.* Under cost causation principles, if a customer is causally responsible for the incurrence of a cost, then that customer—the cost causer—pays a rate that covers this cost. This is consistent with the Commission's existing approach in the make-ready context, where a pole owner recovers the entire associated capital costs through make-ready fees.

48. For purposes of identifying a lower bound for the telecom pole rental rate, we exclude capital costs from the definition of "cost of providing space." As an initial matter, we note that if capital costs arise from the make-ready process, existing rules are designed to require attachers to bear the entire amount of those costs. With respect to other capital costs, the record demonstrates that the attacher is not the "cost causer" of these costs. In the case here of applying cost-causation principles to identify the lower-bound telecom rate, the record includes findings by economists and analysts that capital costs are justifiably excluded from the lower-bound rate because the attachers cause none or no more than a *de minimis* amount of these costs, other than those that are recovered up front through the make-ready fees.

49. By contrast, we continue to include certain operating expenses—namely maintenance and administrative expenses—in the definition of "cost" for purposes of the lower bound telecom rate formula. This is generally consistent with cost causation principles because it is likely that an attacher is causally responsible for some of the ongoing maintenance and administrative expenses relating to use

of the pole. Although the attacher might not be the cost causer with respect to all the operating costs that would be included in the lower bound telecom rate, Congress' intention was that the Commission not "embark upon a large-scale ratemaking proceeding in each case brought before it, or by general order" to establish pole rental rates.

50. *Determining the New Just and Reasonable Telecom Rate.* From within the range of possible interpretations of the term "cost" for purposes of section 224(e), the Commission adopts a particular definition of cost, and therefore a particular rate as the appropriate just and reasonable telecom rate. The definition of cost we select is based on a balancing of policy goals. We seek to ensure that the Commission's policies promote the availability of broadband services and efficient competition for those services. We also recognize, however, that pole rental rates historically have helped support the investment utilities make in their pole infrastructure, and acknowledge utilities' policy concerns about shifting that burden to utility ratepayers.

51. We agree with commenters who explain that today, the telecom rate is sufficiently high that it hinders important statutory objectives. For example, commenters explain that reducing the telecom rate would improve the business case for providing advanced services, because it will reduce the expected incremental cash outflows of providing such services, thereby increasing the likelihood that the present value of the expected incremental cash inflows will exceed the present value of the expected incremental cash outflows. In addition to reducing barriers to the provision of new services, reducing the telecom rate can expand opportunities for communications network investment. We thus conclude that lowering the telecom rates will better enable providers to compete on a level playing field, will eliminate distortions in end-user choices between technologies, and lead to provider behavior being driven more by underlying economic costs than arbitrary price differentials. We also find persuasive the views of consumer advocates in this respect. Notably, "NASUCA members are interested in keeping the costs of pole attachments down, so as to keep the costs of the[se] services * * * down. But NASUCA members also * * * are interested in ensuring that pole attachment rates appropriately compensate the owners of the poles, so that other services are not required to subsidize the attachments." Balancing these concerns, NASUCA recommends that the cable rate "should be used for all pole attachments."

52. We also observe that pole owners have the opportunity to recover through make-ready fees all of the capital costs actually caused by third-party attachers. As a result, the pole owner need not bear any significant risk of unrecovered pole investment undertaken to accommodate a third-party attacher. Thus, permitting recovery of 100 percent of apportioned, fully allocated costs through the pole rental rate seems unwarranted under the statute and could undermine furtherance of important statutory objectives.

53. Although we do not permit utilities to recover 100 percent of apportioned, fully allocated costs through the new telecom rate, we find it appropriate to allow the pole owner to charge a monthly pole rental rate that reflects some contribution to capital costs, aside from those recovered through make-ready fees. For example, regulated pole attachment rates historically have included such a contribution, and we are concerned that adopting a telecom rate that no longer permits utilities to recover such capital costs would unduly burden their ratepayers. We are also mindful of the possible adverse impact of other pole attachment reforms. For one, our regulation of rates for attachments by incumbent LECs could reduce the amount of costs that utilities are able to recover from other sources. Moreover, in conjunction with the pole access reforms adopted in this Order, we are mindful of Congress' expectation that the priority afforded an attacher's access to poles would relate to its sharing in the costs of that infrastructure. We balance these considerations by adopting, in most cases, the following definition of "cost" for purposes of section 224(e): (a) In urban areas, 66 percent of the fully allocated costs used for purposes of the pre-existing telecom rate; and (b) in non-urban areas, 44 percent of the fully allocated costs used for purposes of the pre-existing telecom rate. Defining cost in terms of a percentage of the fully allocated costs previously used for purposes of the telecom rate is a readily administrable approach, and consistent with Congress' direction that the Commission's pole attachment rate regulations be "simple and expeditious" to implement. Further, the specific percentages we select provide a reduction in the telecom rate, and will, in general, approximate the cable rate, advancing the Commission's policies.

54. We adopt a different definition of cost in non-urban areas—namely, 44 percent of fully allocated costs—to address the fact that there typically are fewer attachers on poles in non-urban areas, as reflected by the Commission's presumptions. Given the operation of section 224(e), using the same definition of cost in both types of areas would increase the burden pole attachment rates pose for providers of broadband and other communications services in non-urban areas, as compared to urban areas. Such an outcome would be problematic given the increased challenges already faced in non-urban areas, where cost characteristics can be different and where the availability of, and competition for, broadband services tends to be less today than in urban areas. By defining cost in non-urban areas as 44 percent of the fully allocated costs we largely mitigate that concern, particularly under the Commission's presumptions.

55. We observe that these definitions of cost, when applied pursuant to the cost apportionment formula in section 224(e), generally will recover a portion of the pole costs that is equal to the portion of costs recovered in the cable rate. We conclude that the pole owner will have appropriate incentives to invest in poles and provide attachments to third-party attachers, carrying forward under our new approach to the telecom rate. Moreover, this approach will significantly reduce the marketplace distortions and barriers to the availability of new broadband facilities and services that arose from disparate rates.

56. The Commission's calculations show that the costs for urban and non-urban areas typically will be within the higher- and lower-bound range permissible under section 224(e), and in those circumstances, we adopt that definition of cost for establishing the just and reasonable telecom rate. However, if scenarios arise where the costs identified above would be *lower* than the 100 percent of administrative and operating expenses that serves as a lower bound for the zone of reasonableness, we adopt the higher definition of cost in those circumstances. In sum, the applicable cost for purposes of section 224(e) will be the costs identified above or 100 percent of administrative and operating expenses, whichever is higher.

57. We also reaffirm that wireless carriers are entitled to the benefits and protection of section 224, including the right to the telecom rate under section 224(e). Specifically, in the *1998 Implementation Order,* the Commission explained that it has authority under section 224(e)(1) to prescribe rules governing wireless attachments used by telecommunications carriers to provide

telecommunications services. The Commission also stated that Congress did not intend to distinguish between wired and wireless attachments and that there was no basis to limit the definition of telecommunications carriers under the statute only to wireline providers. The Commission noted that, despite the "potential difficulties in applying the Commission's rules to wireless pole attachments, as opponents of attachment rights have argued," it did not see any need for separate rules. Instead, it explained that "[w]hen an attachment requires more than the presumptive one-foot of usable space on the pole," the presumption can be rebutted. Accordingly, wireless attachments are entitled to the telecom rate formula, and where parties are unable to reach agreement through good faith negotiations, they may bring a complaint before the Commission.

58. We also address the role of the new telecom rate in the context of commingled services. Some cable operators express concern that pole owners will seek to impose rates higher than both the cable rate and the new telecom rate where cable operators or telecommunications carriers also provide services, such as VoIP, that have not been classified. We agree that this outcome would be contrary to our policy goals of reducing the disparity in pole rental rates among providers of competing services and of minimizing disputes. Consequently, we make clear that the use of pole attachments by providers of telecommunications services or cable operators to provide commingled services does not remove them from the pole attachment rate regulation framework under section 224. Rather, we will not consider rates for pole attachments by telecommunications carriers or cable operators providing commingled services to be "just and reasonable" if they exceed the new telecom rate. This action does not disturb prior Commission decisions addressing particular scenarios regarding commingled services.

59. We believe that section 224(e) provides the Commission sufficient latitude to adopt our definition of costs underlying the new telecom rate. In particular, section 224(e)(2) and (3) describe how "[a] utility shall apportion the cost of providing space" on a pole—whether usable or unusable—but does not define the term "cost." We therefore find the term "the cost of providing space" to be ambiguous." Our new telecom rate reflects a reasonable interpretation of the ambiguous statutory language, and we conclude that Congress gave the Commission authority to interpret section 224(e), including the ambiguous phrases "cost of providing space * * * other than the usable space" in section 224(e)(2) and "cost of providing usable space" in section 224(e)(3).

60. We are not persuaded by electric utilities that argue section 224(e) must be read in a manner that mandates use of a fully allocated cost methodology based on legislative history. Primarily, they cite to language in the legislative history of the House bill endorsing a fully allocated cost methodology and other discussions in the legislative history attempting to link the benefits attachers receive from pole attachments to pole rental rates. We are not persuaded that these arguments compel an interpretation of section 224(e) that is contrary to the Commission's approach.

61. We also are not persuaded by claims of utilities that the new telecom rate will not enable them to recover their costs. The new telecom rate is compensatory and is designed so that utilities will not be cross-subsidizing attachers, as it ensures that utilities will recover more than the incremental cost of making attachments. The record provides no evidence indicating that there is any category or type of costs that are caused by the attacher that are not recovered through the new telecom rate.

B. Incumbent LEC Pole Attachments

62. In the 2010 *FNPRM,* the Commission asked parties to refresh the record on the issues raised in the 2007 *Pole Attachment NPRM* "both in light of the specific telecom rate proposals, as well as the factual findings of the National Broadband Plan." In addition, the Commission sought comment "on the relationship between the pole rental rates paid by incumbent LECs and any other rights and responsibilities they have by virtue of their pole access agreements with utilities," such as joint use agreements, and whether any remedies otherwise were available to incumbent LECs absent the ability to file complaints with the Commission. The *FNPRM* also sought comment on proposals under which incumbent LECs' regulated rate would be an existing rate, whether the cable rate, the pre-existing telecom rate, or any new rate adopted in this proceeding, or an alternative rate, as well as how to balance the rate paid with the other terms and conditions in incumbent LECs' pole attachment agreements with other utilities.

63. Based on the record in this proceeding, we find it appropriate to revisit our interpretation of section 224 with respect to rates, terms and conditions for pole attachments by incumbent LECs. We allow incumbent LECs to file complaints with the Commission challenging the rates, terms and conditions of pole attachment agreements with other utilities.

64. *Statutory Analysis.* In implementing section 224, as amended by the 1996 Act, the Commission interpreted the exclusion of incumbent LECs from the term "telecommunications carrier" to mean that section 224 does not apply to attachment rates paid by incumbent LECs. Although these decisions did not consider alternative interpretations of incumbent LECs' rights under section 224 in detail, the Commission's interpretation appears to have been based in part on incumbent LECs' status as pole owners and thus "utilities" under section 224, and in part on the view that "Congress' intent" was to "promote competition by ensuring the availability of access to new telecommunications entrants."

65. We find it appropriate to change the Commission's prior interpretation of section 224(b) with respect to incumbent LECs given the evidence in the record regarding current market realities. Over time, aggregate incumbent LEC pole ownership has diminished relative to that of electric utilities. Thus, incumbent LECs often may not be in an equivalent bargaining position with electric utilities in pole attachment negotiations in some cases. Further, although we agree with the Commission's prior assessment that "Congress' intent" in section 224—and the 1996 Act more broadly—was to "promote competition," we believe this intent was not limited to entities that were "new telecommunications entrants" at the time of the 1996 Act.

66. In reviewing the Commission's prior interpretation of section 224, we note that even incumbent LECs acknowledge that they are excluded from the section 224 definition of "telecommunications carrier," and generally concede that they thus have no statutory right to nondiscriminatory pole access under section 224(f)(1). That is, they agree that because section 224(f)(1) requires utilities to provide nondiscriminatory access to "telecommunications carriers," which exclude incumbent LECs, they have no statutory right of nondiscriminatory access to poles, ducts, conduits or rights-of-way under this provision of the Act. We agree. They also contend, however, that sections 224(b)(1) and 224(a)(4) provide an independent right to reasonable rates, terms and conditions for any pole attachment by a

provider of telecommunications service, and that the statute thus mandates the Commission to apply the "just and reasonable" standard to pole attachments for all such providers, including incumbent LECs.

67. We are persuaded to revisit our prior conclusion, and instead adopt a new interpretation of section 224(b). Specifically, we find that the Commission has authority to ensure that incumbent LECs' attachments to other utilities' poles are pursuant to rates, terms and conditions that are just and reasonable. For one, this reflects the marketplace evidence discussed above. This also reflects the fact that actions to reduce input costs, such as pole rental rates, can expand opportunities for investment, especially in combination with other actions, which is particularly important given the up to 24 million Americans that do not have access to broadband today. Incumbent LECs identify five specific categories of consumer benefits arising from ensuring just and reasonable rates for incumbent LECs' attachments to other utilities' poles: (1) Reduced demand on the universal service fund arising from reduced incumbent LEC costs; (2) automatic flow-through of cost reductions to the regulated rates of rate-of-return incumbent LECs; (3) use of cost savings to improve service and/or lower prices for broadband services in areas with competition; (4) increased broadband deployment in areas where incumbent LECs currently do not provide broadband due to the improved business case; and (5) a source of capital for expansion. We expect these promised consumer benefits to occur, and we encourage incumbent LECs to provide data to the Commission on an ongoing basis demonstrating the extent to which these benefits are being realized. We would be concerned if these consumer benefits were not realized. We will continue to monitor the outcomes of the Order, and in the absence of evidence that expected benefits are being realized, we may, among other things, revisit our approach to this issue.

68. We conclude that neither the language or structure of section 224 precludes our finding that incumbent LECs are entitled to pole attachment rates, terms and conditions that are just and reasonable pursuant to section 224(b)(1). The Commission's authority to regulate the rates, terms and conditions of pole attachments by incumbent LECs derives principally from section 224(b) of the Act. In particular, section 224(b)(1) provides that the Commission "shall regulate the rates, terms, and conditions for pole attachments to provide that such rates, terms, and conditions are just and reasonable, and shall adopt procedures necessary and appropriate to hear and resolve complaints concerning such rates, terms, and conditions." The statute defines the term "pole attachment," in turn, as "any attachment by a cable television system or provider of telecommunications service to a pole, duct, conduit, or right-of-way owned or controlled by a utility."

69. Although section 224(a)(5) cites section 3 of the Communications Act as a starting point for defining "telecommunications carrier," by excluding incumbent LECs, it deviates from that baseline, resulting in a definition that is unique to section 224. In addition, where Congress did not intend for the Commission to regulate rates, terms and conditions in a particular respect, it stated this clearly. Section 224's departure from the definition in section 3, coupled with the fact that Congress could have expressly excluded attachments by incumbent LECs from the Commission's jurisdiction over rates, terms and conditions under section 224(b)(1), persuade us to interpret "provider of telecommunications service" as distinct from "telecommunications carrier" for purposes of section 224.

70. Interpreting these terms as distinct leads us to conclude that the definition of "pole attachment" includes pole attachments of incumbent LECs. Moreover, because section 224(b) requires the Commission to "regulate the rates, terms, and conditions for *pole attachments,*" under our revised reading the Commission has a statutory obligation to regulate the attachments of incumbent LECs.

71. *Guidance Regarding Commission Review of Incumbent LEC Pole Attachment Complaints.* Having found that section 224(b) enables the Commission to ensure that pole attachments by incumbent LECs are accorded just and reasonable rates, terms and conditions, we recognize the need to exercise that authority in a manner that accounts for the potential differences between incumbent LECs and telecommunications carrier or cable operator attachers. As we observed in the *FNPRM,* the issues related to rates for pole attachments by incumbent LECs raise complex questions, both with respect to potential remedies for incumbent LECs and the details of the complaint process itself. These complexities can arise because, for example, incumbent LECs also own many poles and historically have obtained access to other utilities' poles within their incumbent LEC service territory through "joint use" or other agreements. We therefore decline at this time to adopt comprehensive rules governing incumbent LECs' pole attachments, finding it more appropriate to proceed on a case-by-case basis. We do, however, provide certain guidance below regarding the Commission's approach to incumbent LEC pole attachment complaints.

72. We also note that outside of the carrier's incumbent LEC service territory, it would be subject to the pole attachment regulations applicable to a telecommunications carrier. In addition, we decline to apply our new interpretation of section 224 retroactively, and make clear that incumbent LECs only can get refunds of amounts paid subsequent to the effective date of this Order.

73. *Evidence of Bargaining Power.* We recognize that not all incumbent LECs are similarly situated in terms of their bargaining position relative to other pole owners. For example, although there has been a general trend of reduced pole ownership by incumbent LECs' relative to other utilities, there is evidence that circumstances can vary considerably from location to location. Where parties are in a position to achieve just and reasonable rates, terms and conditions through negotiation, we believe it generally is appropriate to defer to such negotiations. Thus, in evaluating incumbent LEC pole attachment complaints, the Commission will consider the incumbent LEC's evidence that it is in an inferior bargaining position to the utility against which it has filed the complaint.

74. *Existing vs. New Agreements.* The record reveals that incumbent LECs frequently have access to pole attachments pursuant to joint use agreements today. Although some incumbent LECs express concerns about existing joint use agreements, these long-standing agreements generally were entered into at a time when incumbent LECs concede they were in a more balanced negotiating position with electric utilities, at least based on relative pole ownership. As explained above, we question the need to second guess the negotiated resolution of arrangements entered into by parties with relatively equivalent bargaining power. Consistent with the foregoing, the Commission is unlikely to find the rates, terms and conditions in existing joint use agreements unjust or unreasonable. The record also indicates, however, that both incumbent LECs and other utilities have the ability to terminate existing agreements and seek new arrangements, and that, at times, each type of entity has sought to do so.

To the extent that an incumbent LEC can demonstrate that it genuinely lacks the ability to terminate an existing agreement and obtain a new arrangement, the Commission can consider that as appropriate in a complaint proceeding. The Commission will review complaints regarding agreements between incumbent LECs and other utilities entered into following the adoption of this Order based on the totality of those agreements, consistent with the additional guidance we offer below. In addition, to the extent that an incumbent LEC can show that it was compelled to sign a new pole attachment agreement with rates, terms, or conditions that it contends are unjust or unreasonable simply to maintain pole access as a result of a utility's unequal bargaining power, we note that the "sign and sue" rule will apply here in a manner similar to its application in the context of pole attachment agreements between pole owners and either cable operators or telecommunications carriers.

75. *Reference to Other Agreements.* As discussed above, the historical joint use agreements between incumbent LECs and other utilities implicate rights and responsibilities that differ from those in typical pole lease agreements between utilities and telecommunications carriers or cable operators. Under any new agreements, to the extent that the incumbent LEC demonstrates that it is obtaining pole attachments on terms and conditions that leave them comparably situated to telecommunications carriers or cable operators, we believe it will be appropriate to use the rate of the comparable attacher as the "just and reasonable" rate for purposes of section 224(b). As discussed above, just and reasonable pole attachments rates for incumbent LECs are not bound by the formulas in sections 224(d) or (e). Where incumbent LECs are attaching to other utilities' poles on terms and conditions that are comparable to those that apply to a telecommunications carrier or a cable operator—which generally will be paying a rate equal or similar to the cable rate under our rules—competitive neutrality counsels in favor of affording incumbent LECs the same rate as the comparable provider (whether the telecommunications carrier or the cable operator). In this regard, an incumbent LEC might demonstrate that it obtains access to poles on terms and conditions that are the same as a telecommunications carrier or cable operator. Likewise, an incumbent LEC may seek the same *term* or *condition* that applies to a telecommunications carrier or cable operator upon a showing that it otherwise is comparably situated to that provider.

76. Even if the terms and conditions of access are not the same, however, incumbent LECs may seek to demonstrate that the arrangement at issue does not provide a material advantage to incumbent LECs relative to cable operators or telecommunications carriers. To facilitate this analysis, we modify our pole attachment complaint rules to require that incumbent LECs provide, in a complaint proceeding, any agreements between the defendant utility and a third party attacher with whom the incumbent LEC claims it is similarly situated (or that the other utility do so if necessary).

77. By contrast, if a new pole attachment agreement between an incumbent LEC and a pole owner includes provisions that materially advantage the incumbent LEC *vis a vis* a telecommunications carrier or cable operator, we believe that a different rate should apply. Just as considerations of competitive neutrality counsel in favor of similar treatment of similarly situated providers, so too should differently situated providers be treated differently. In particular, we find it reasonable to look to the pre-existing, high-end telecom rate as a reference point in complaint proceedings involving a pole owner and an incumbent LEC attacher that is not similarly situated, or has failed to show that it is similarly situated to a cable or telecommunications attacher. As a higher rate than the regulated rate available to telecommunications carriers and cable operators, it helps account for particular arrangements that provide net advantages to incumbent LECs relative to cable operators or telecommunications carriers. We find it prudent to identify a specific rate to be used as a reference point in these circumstances because it will enable better informed pole attachment negotiations between incumbent LECs and electric utilities. We also believe it will reduce the number of disputes for which Commission resolution is required by providing parties clearer expectations regarding the potential outcomes of formal complaints, thus narrowing the scope of the conflict. For example, we would be skeptical of a complaint by an incumbent LEC seeking a proportionately lower rate to attach to an electric utility's poles than the rate the incumbent LEC is charging the electric utility to attach to its poles. We believe that a just and reasonable rate in such circumstances would be the same proportionate rate charged the electric utility, given the incumbent LEC's relative usage of the pole (such as the same rate per foot of occupied space). Further, we find it more administrable to look to the existing, high-end telecom rate, which historically has been used in the marketplace, than to attempt to develop in this Order an entirely new rate for this context.

78. We also recognize that incumbent LECs generally are pole owners themselves and, like electric utilities, have agreements governing access to their poles. As appropriate, in evaluating an incumbent LEC's complaint, the Commission may also consider the rates, terms and conditions that the incumbent LEC offers to the electric utility or other attachers for access to the incumbent LEC's poles, including whether they are more or less favorable than the rates, terms and conditions the incumbent LEC is seeking. Further, evidence that a term or condition was contained in the parties' prior joint use agreement will carry significant weight in the Commission's assessment of whether a refusal to agree to a substantially different term or condition regarding the same subject in a new agreement is unreasonable.

79. *Other Fora for Dispute Resolution.* Some electric utilities and other commenters have observed that certain state commissions might provide a forum for resolving incumbent LEC-electric utility pole attachment disputes. We do not preclude parties from electing to pursue complaints before state commissions, rather than before the Commission. Section 224 ensures incumbent LECs of appropriate Commission oversight of their pole attachments, however, and we therefore do not require incumbent LECs to pursue relief in state fora before filing a complaint with the Commission.

Clarification and Reconsideration of the *2010 Order*

80. *Prospective Policies.* We clarify that a utility may not simply prohibit an attacher from using boxing, bracketing, or any other attachment technique on a going forward basis where the utility, at the time of an attacher's request, employs such techniques itself. As Fibertech points out, even a policy that is equally applied prospectively is discriminatory in the sense that it disadvantages new attachers. Thus, the relevant standards for purposes of determining a utility's "existing practices" are those that a utility applies at the time of an attacher's request to use a particular attachment technique—not the standards that a utility wishes to apply going forward. A utility may,

however, choose to reduce or eliminate altogether the use of a particular method of attachment used on its poles, including boxing or bracketing, which would alter the range of circumstances in which it is obligated to allow future attachers to use the same techniques.

81. *Joint Ownership.* We also clarify that, where a pole is jointly owned and the owners have adopted different standards regarding the use of boxing, bracketing, or other attachment techniques, the joint owners may apply the more restrictive standards. For instance, if an electric utility and an incumbent LEC jointly own a pole but have divergent standards regarding the use of boxing, they may refuse to allow an attacher to box in a situation where boxing would be allowed by one utility's standards but not the other's. We disagree with Fibertech that permitting application of the more restrictive standard will allow joint pole owners to "double team" attachers by demanding compliance with one set of standards initially and then a different set later. In order to avoid a claim that their terms and conditions for access are unjust, unreasonable or discriminatory, joint pole owners should settle on and apply a single set of standards—not different sets at different times.

82. *Similar Circumstances and the Electric Space.* At the Coalition's request, we clarify that an electric utility's use of a particular attachment technique for facilities in the electric space does not obligate the utility to allow the same technique to be used by attachers in the communications space. We likewise clarify, in response to the Florida IOUs' request, that the existence of boxing and bracketing configurations in the electric space do not trigger an attacher's right to use boxing and bracketing in the communications space. The *2010 Order* specified that attachers are entitled to use the same techniques that the utility itself uses in similar circumstances, and we agree with the petitioners that the above situations do not involve similar circumstances. For instance, boxing and bracketing in the communications space can limit the use of climbing as a means of maintenance and repair, and also complicate pole change out.

83. We disagree with the petitioners, however, that the nondiscrimination requirement in section 224(f)(1) applies only to the extent that a pole owner has allowed itself or others to use an attachment technique in the communications space of a pole. As explained in further detail below, the Act does not limit a utility's nondiscrimination obligations to activities that take place in the communications space. Thus, while an electric utility's use of an attachment technique in the electric space might not obligate it to permit use of such technique in the communications space, its use of an attachment technique (like boxing and bracketing) in the electric space may, in fact, obligate it to allow use of that technique in the electric space. The salient issue is whether the attacher's use of a particular technique is consistent with the utility's, not whether its use is consistent with the utility's in the communication space.

84. *Insufficient Capacity and the Electric Space.* We deny the Florida IOUs' request to find that a pole has "insufficient capacity" if an electric utility must rearrange its electric facilities to accommodate a new attacher. As explained in the *2010 Order,* a pole does not have insufficient capacity where a request for attachment could be accommodated using traditional methods of attachment. Rearrangement of facilities on a pole is one of these methods, and nothing in the statute suggests that, for purposes of gauging capacity, rearrangement of facilities in the electric space should be treated differently from rearrangement of facilities in the communications space. Thus, where rearrangement of a pole's facilities—whether in the communications space or the electric space—can accommodate an attachment, there is not "insufficient capacity" under section 224(f)(2).

85. *Space-and Cost-Saving.* The Florida IOUs argue that section 224(f)(2) allows an electric utility to deny use of a particular attachment technique when the utility itself has not used or authorized that technique as a means of saving both space and cost. We disagree that section 224(f)(2) is so limited. We find that the Florida IOUs' restrictive interpretation has no basis in the text of section 224 and would enable a utility to refuse an attacher use of a particular attachment technique in situations where the utility itself uses the technique or authorizes its use by third parties. If a utility uses bracketing as a means of saving cost (but not space) in a particular type of situation, for instance, it must allow attachers also to use bracketing. But under the Florida IOUs' formulation, the utility would have no duty to do so.

Congressional Review Act

86. The Commission will send a copy of this Report and Order in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act, *see* 5 U.S.C. 801(a)(1)(A).

Paperwork Reduction Act of 1995 Analysis

87. This document contains new information collection requirements subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104–13. It will be submitted to the Office of Management and Budget (OMB) for review under section 3507(d) of the PRA. OMB, the general public, and other Federal agencies are invited to comment on the new or modified information collection requirements adopted in this Order.

Final Regulation Flexibility Analysis

88. As required by the Regulatory Flexibility Act of 1980, as amended (RFA), an Initial Regulatory Flexibility Analysis (IRFA) was included in the *2010 Order and FNPRM* in WC Docket No. 07–245 and GN Docket No. 09–51. The Commission sought written public comment on the proposals in these dockets, including comment on the IRFA. This Final Regulatory Flexibility Analysis (FRFA) conforms to the RFA.

A. Need for, and Objectives of, the Proposed Rules

89. In this *Report and Order and Order on Reconsideration* (Order), FCC 11–50, adopted and released on April 7, 2011, the Commission revises its pole attachment rules to promote competition and to reduce the potentially excessive costs of deploying telecommunications, cable, and broadband networks. The Commission has historically relied primarily on private negotiations and case-specific adjudications to ensure just and reasonable rates, terms, and conditions, but its experience during the past 15 years has demonstrated the need to provide more guidance. Accordingly, the Commission establishes a four-stage timeline for wireline and wireless access to poles; provides attachers with a self-effectuating contractor remedy in the communications space; improves its enforcement rules; reinterprets the telecommunications rate formula within the existing statutory framework; and addresses rates, terms, and conditions for pole attachments by incumbent LECs. The Commission also resolves multiple petitions for reconsideration and addresses various points regarding the nondiscriminatory use of attachment techniques.

B. Summary of the Significant Issues Raised by the Public Comments in Response to the IRFA and Summary of the Assessment of the Agency of Such Issues

90. One commenter discussed the IRFA from the FNPRM. A group of

associations representing rural telephone companies argued specifically that the Commission should adopt the lowest telecom rate for broadband connections, adopt an incumbent LEC dispute resolution process, and cap pole attachment orders at 100 poles. We squarely address these concerns by revising the section 224(e) rental rate for pole attachments used by telecommunications carriers to provide telecommunications services; permitting incumbent LECs to file complaints with the Commission to ensure reasonable rates, terms, and conditions of pole attachments; and adopting the lesser of a numerical or a percentage-based cap on pole orders.

C . Description and Estimate of the Number of Small Entities to Which the Proposed Rules May Apply

91. The RFA directs agencies to provide a description of, and where feasible, an estimate of the number of small entities that may be affected by the proposed rules and policies, if adopted. The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction." In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act. A "small business concern" is one which: (1) Is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the SBA.

92. *Small Businesses.* Nationwide, there are a total of approximately 29.6 million small businesses, according to the SBA.

93. *Small Organizations.* Nationwide, as of 2002, there are approximately 1.6 million small organizations. A "small organization" is generally "any not-for-profit enterprise which is independently owned and operated and is not dominant in its field."

94. *Small Governmental Jurisdictions.* The term "small governmental jurisdiction" is defined generally as "governments of cities, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand." Census Bureau data for 2002 indicate that there were 87,525 local governmental jurisdictions in the United States. We estimate that, of this total, 84,377 entities were "small governmental jurisdictions." Thus, we estimate that most governmental jurisdictions are small.

95. We have included small incumbent local exchange carriers in this present RFA analysis. As noted above, a "small business" under the RFA is one that, inter alia, meets the pertinent small business size standard *(e.g.,* a telephone communications business having 1,500 or fewer employees), and "is not dominant in its field of operation." The SBA's Office of Advocacy contends that, for RFA purposes, small incumbent local exchange carriers are not dominant in their field of operation because any such dominance is not "national" in scope. We have therefore included small incumbent local exchange carriers in this RFA analysis, although we emphasize that this RFA action has no effect on Commission analyses and determinations in other, non-RFA contexts.

96. *Incumbent Local Exchange Carriers (ILECs).* Neither the Commission nor the SBA has developed a small business size standard specifically for incumbent local exchange services. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees. According to Commission data, 1,311 carriers have reported that they are engaged in the provision of incumbent local exchange services. Of these 1,311 carriers, an estimated 1,024 have 1,500 or fewer employees and 287 have more than 1,500 employees. Consequently, the Commission estimates that most providers of incumbent local exchange service are small businesses that may be affected by our proposed action.

97. *Competitive Local Exchange Carriers (CLECs), Competitive Access Providers (CAPs), "Shared-Tenant Service Providers," and "Other Local Service Providers."* Neither the Commission nor the SBA has developed a small business size standard specifically for these service providers. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees. According to Commission data, 1005 carriers have reported that they are engaged in the provision of either competitive access provider services or competitive local exchange carrier services. Of these 1005 carriers, an estimated 918 have 1,500 or fewer employees and 87 have more than 1,500 employees. In addition, 16 carriers have reported that they are "Shared-Tenant Service Providers," and all 16 are estimated to have 1,500 or fewer employees. In addition, 89 carriers have reported that they are "Other Local Service Providers." Of the 89, all have 1,500 or fewer employees. Consequently, the Commission estimates that most providers of competitive local exchange service, competitive access providers, "Shared-Tenant Service Providers," and "Other Local Service Providers" are small entities that may be affected by our proposed action.

98. *Interexchange Carriers (IXCs).* Neither the Commission nor the SBA has developed a small business size standard specifically for providers of interexchange services. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees. According to Commission data, 300 carriers have reported that they are engaged in the provision of interexchange service. Of these, an estimated 268 have 1,500 or fewer employees and 32 have more than 1,500 employees. Consequently, the Commission estimates that the majority of IXCs are small entities that may be affected by our proposed action.

99. *Satellite Telecommunications and All Other Telecommunications.* These two economic census categories address the satellite industry. The first category has a small business size standard of $15 million or less in average annual receipts, under SBA rules. The second has a size standard of $25 million or less in annual receipts. The most current Census Bureau data in this context, however, are from the (last) economic census of 2002, and we will use those figures to gauge the prevalence of small businesses in these categories.

100. The category of Satellite Telecommunications "comprises establishments primarily engaged in providing telecommunications services to other establishments in the telecommunications and broadcasting industries by forwarding and receiving communications signals via a system of satellites or reselling satellite telecommunications." For this category, Census Bureau data for 2002 show that there were a total of 371 firms that operated for the entire year. Of this total, 307 firms had annual receipts of under $10 million, and 26 firms had receipts of $10 million to $24,999,999. Consequently, we estimate that the majority of Satellite Telecommunications firms are small entities that might be affected by our action.

101. The second category of All Other Telecommunications comprises, *inter alia,* "establishments primarily engaged in providing specialized telecommunications services, such as satellite tracking, communications

telemetry, and radar station operation. This industry also includes establishments primarily engaged in providing satellite terminal stations and associated facilities connected with one or more terrestrial systems and capable of transmitting telecommunications to, and receiving telecommunications from, satellite systems." For this category, Census Bureau data for 2002 show that there were a total of 332 firms that operated for the entire year. Of this total, 303 firms had annual receipts of under $10 million and 15 firms had annual receipts of $10 million to $24,999,999. Consequently, we estimate that the majority of All Other Telecommunications firms are small entities that might be affected by our action.

102. *Wireless Telecommunications Carriers (except Satellite).* Since 2007, the Census Bureau has placed wireless firms within this new, broad, economic census category. Prior to that time, such firms were within the now-superseded categories of "Paging" and "Cellular and Other Wireless Telecommunications." Under the present and prior categories, the SBA has deemed a wireless business to be small if it has 1,500 or fewer employees. Because Census Bureau data are not yet available for the new category, we will estimate small business prevalence using the prior categories and associated data. For the category of Paging, data for 2002 show that there were 807 firms that operated for the entire year. Of this total, 804 firms had employment of 999 or fewer employees, and three firms had employment of 1,000 employees or more. For the category of Cellular and Other Wireless Telecommunications, data for 2002 show that there were 1,397 firms that operated for the entire year. Of this total, 1,378 firms had employment of 999 or fewer employees, and 19 firms had employment of 1,000 employees or more. Thus, we estimate that the majority of wireless firms are small.

103. *Common Carrier Paging.* As noted, since 2007 the Census Bureau has placed paging providers within the broad economic census category of Wireless Telecommunications Carriers (except Satellite). Prior to that time, such firms were within the now-superseded category of "Paging." Under the present and prior categories, the SBA has deemed a wireless business to be small if it has 1,500 or fewer employees. Because Census Bureau data are not yet available for the new category, we will estimate small business prevalence using the prior category and associated data. The data for 2002 show that there were 807 firms that operated for the entire year. Of this total, 804 firms had employment of 999 or fewer employees, and three firms had employment of 1,000 employees or more. Thus, we estimate that the majority of paging firms are small.

104. In addition, in the *Paging Second Report and Order,* the Commission adopted a size standard for "small businesses" for purposes of determining their eligibility for special provisions such as bidding credits and installment payments. A small business is an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding $15 million for the preceding three years. The SBA has approved this definition. An initial auction of Metropolitan Economic Area (MEA) licenses was conducted in the year 2000. Of the 2,499 licenses auctioned, 985 were sold. Fifty-seven companies claiming small business status won 440 licenses. A subsequent auction of MEA and Economic Area (EA) licenses was held in the year 2001. Of the 15,514 licenses auctioned, 5,323 were sold. One hundred thirty-two companies claiming small business status purchased 3,724 licenses. A third auction, consisting of 8,874 licenses in each of 175 EAs and 1,328 licenses in all but three of the 51 MEAs, was held in 2003. Seventy-seven bidders claiming small or very small business status won 2,093 licenses.

105. Currently, there are approximately 74,000 Common Carrier Paging licenses. According to the most recent *Trends in Telephone Service,* 281 carriers reported that they were engaged in the provision of "paging and messaging" services. Of these, an estimated 279 have 1,500 or fewer employees and two have more than 1,500 employees. We estimate that the majority of common carrier paging providers would qualify as small entities under the SBA definition.

106. *Wireless Telephony.* Wireless telephony includes cellular, personal communications services, and specialized mobile radio telephony carriers. As noted, the SBA has developed a small business size standard for Wireless Telecommunications Carriers (except Satellite). Under the SBA small business size standard, a business is small if it has 1,500 or fewer employees. According to *Trends in Telephone Service* data, 434 carriers reported that they were engaged in wireless telephony. Of these, an estimated 222 have 1,500 or fewer employees and 212 have more than 1,500 employees. We have estimated that 222 of these are small under the SBA small business size standard.

107. *Broadband Personal Communications Service.* The broadband personal communications services (PCS) spectrum is divided into six frequency blocks designated A through F, and the Commission has held auctions for each block. The Commission has created a small business size standard for Blocks C and F as an entity that has average gross revenues of less than $40 million in the three previous calendar years. For Block F, an additional small business size standard for "very small business" was added and is defined as an entity that, together with its affiliates, has average gross revenues of not more than $15 million for the preceding three calendar years. These small business size standards, in the context of broadband PCS auctions, have been approved by the SBA. No small businesses within the SBA-approved small business size standards bid successfully for licenses in Blocks A and B. There were 90 winning bidders that qualified as small entities in the Block C auctions. A total of 93 "small" and "very small" business bidders won approximately 40 percent of the 1,479 licenses for Blocks D, E, and F. In 1999, the Commission reauctioned 155 C, D, E, and F Block licenses; there were 113 small business winning bidders.

108. In 2001, the Commission completed the auction of 422 C and F Broadband PCS licenses in Auction 35. Of the 35 winning bidders in this auction, 29 qualified as "small" or "very small" businesses. Subsequent events, concerning Auction 35, including judicial and agency determinations, resulted in a total of 163 C and F Block licenses being available for grant. In 2005, the Commission completed an auction of 188 C block licenses and 21 F block licenses in Auction 58. There were 24 winning bidders for 217 licenses. Of the 24 winning bidders, 16 claimed small business status and won 156 licenses. In 2007, the Commission completed an auction of 33 licenses in the A, C, and F Blocks in Auction 71. Of the 14 winning bidders, six were designated entities. In 2008, the Commission completed an auction of 20 Broadband PCS licenses in the C, D, E and F block licenses in Auction 78.

109. *Advanced Wireless Services.* In 2008, the Commission conducted the auction of Advanced Wireless Services (AWS) licenses. This auction, which as designated as Auction 78, offered 35 licenses in the AWS 1710–1755 MHz and 2110–2155 MHz bands (AWS–1). The AWS–1 licenses were licenses for which there were no winning bids in Auction 66. That same year, the Commission completed Auction 78. A

bidder with attributed average annual gross revenues that exceeded $15 million and did not exceed $40 million for the preceding three years (small business) received a 15 percent discount on its winning bid. A bidder with attributed average annual gross revenues that did not exceed $15 million for the preceding three years (very small business) received a 25 percent discount on its winning bid. A bidder that had combined total assets of less than $500 million and combined gross revenues of less than $125 million in each of the last two years qualified for entrepreneur status. Four winning bidders that identified themselves as very small businesses won 17 licenses. Three of the winning bidders that identified themselves as a small business won five licenses. Additionally, one other winning bidder that qualified for entrepreneur status won 2 licenses.

110. *Narrowband Personal Communications Services.* In 1994, the Commission conducted an auction for Narrowband PCS licenses. A second auction was also conducted later in 1994. For purposes of the first two Narrowband PCS auctions, "small businesses" were entities with average gross revenues for the prior three calendar years of $40 million or less. Through these auctions, the Commission awarded a total of 41 licenses, 11 of which were obtained by four small businesses. To ensure meaningful participation by small business entities in future auctions, the Commission adopted a two-tiered small business size standard in the Narrowband PCS Second Report and Order. A "small business" is an entity that, together with affiliates and controlling interests, has average gross revenues for the three preceding years of not more than $40 million. A "very small business" is an entity that, together with affiliates and controlling interests, has average gross revenues for the three preceding years of not more than $15 million. The SBA has approved these small business size standards. A third auction was conducted in 2001. Here, five bidders won 317 (Metropolitan Trading Areas and nationwide) licenses. Three of these claimed status as a small or very small entity and won 311 licenses.

111. *Cellular Radiotelephone Service.* Auction 77 was held to resolve one group of mutually exclusive applications for Cellular Radiotelephone Service licenses for unserved areas in New Mexico. Bidding credits for designated entities were not available in Auction 77. In 2008, the Commission completed the closed auction of one unserved service area in the Cellular Radiotelephone Service, designated as Auction 77. Auction 77 concluded with one provisionally winning bid for the unserved area totaling $25,002.

112. *Private Land Mobile Radio (PLMR).* PLMR systems serve an essential role in a range of industrial, business, land transportation, and public safety activities. These radios are used by companies of all sizes operating in all U.S. business categories, and are often used in support of the licensee's primary (non-telecommunications) business operations. For the purpose of determining whether a licensee of a PLMR system is a small business as defined by the SBA, we use the broad census category, Wireless Telecommunications Carriers (except Satellite). This definition provides that a small entity is any such entity employing no more than 1,500 persons. The Commission does not require PLMR licensees to disclose information about number of employees, so the Commission does not have information that could be used to determine how many PLMR licensees constitute small entities under this definition. We note that PLMR licensees generally use the licensed facilities in support of other business activities, and therefore, it would also be helpful to assess PLMR licensees under the standards applied to the particular industry subsector to which the licensee belongs.

113. As of March 2010, there were 424,162 PLMR licensees operating 921,909 transmitters in the PLMR bands below 512 MHz. We note that any entity engaged in a commercial activity is eligible to hold a PLMR license, and that any revised rules in this context could therefore potentially impact small entities covering a great variety of industries.

114. *Fixed Microwave Services.* Fixed microwave services include common carrier, private operational-fixed, and broadcast auxiliary radio services. At present, there are approximately 22,015 common carrier fixed licensees and 61,670 private operational-fixed licensees and broadcast auxiliary radio licensees in the microwave services. The Commission has not created a size standard for a small business specifically with respect to fixed microwave services. For purposes of this analysis, the Commission uses the SBA small business size standard for the category Wireless Telecommunications Carriers (except Satellite), which is 1,500 or fewer employees. The Commission does not have data specifying the number of these licensees that have no more than 1,500 employees, and thus are unable at this time to estimate with greater precision the number of fixed microwave service licensees that would qualify as small business concerns under the SBA's small business size standard. Consequently, the Commission estimates that there are 22,015 or fewer common carrier fixed licensees and 61,670 or fewer private operational-fixed licensees and broadcast auxiliary radio licensees in the microwave services that may be small and may be affected by the rules and policies proposed herein. We note, however, that the common carrier microwave fixed licensee category includes some large entities.

115. *Local Multipoint Distribution Service.* Local Multipoint Distribution Service (LMDS) is a fixed broadband point-to-multipoint microwave service that provides for two-way video telecommunications. The auction of the 986 LMDS licenses began and closed in 1998. The Commission established a small business size standard for LMDS licenses as an entity that has average gross revenues of less than $40 million in the three previous calendar years. An additional small business size standard for "very small business" was added as an entity that, together with its affiliates, has average gross revenues of not more than $15 million for the preceding three calendar years. The SBA has approved these small business size standards in the context of LMDS auctions. There were 93 winning bidders that qualified as small entities in the LMDS auctions. A total of 93 small and very small business bidders won approximately 277 A Block licenses and 387 B Block licenses. In 1999, the Commission re-auctioned 161 licenses; there were 32 small and very small businesses winning that won 119 licenses.

116. *Rural Radiotelephone Service.* The Commission has not adopted a size standard for small businesses specific to the Rural Radiotelephone Service. A significant subset of the Rural Radiotelephone Service is the Basic Exchange Telephone Radio System (BETRS). In the present context, we will use the SBA's small business size standard applicable to Wireless Telecommunications Carriers (except Satellite), *i.e.,* an entity employing no more than 1,500 persons. There are approximately 1,000 licensees in the Rural Radiotelephone Service, and the Commission estimates that there are 1,000 or fewer small entity licensees in the Rural Radiotelephone Service that may be affected by the rules and policies proposed herein.

117. *Broadband Radio Service and Educational Broadband Service.* Broadband Radio Service systems, previously referred to as Multipoint

Distribution Service (MDS) and Multichannel Multipoint Distribution Service (MMDS) systems, and "wireless cable," transmit video programming to subscribers and provide two-way high speed data operations using the microwave frequencies of the Broadband Radio Service (BRS) and Educational Broadband Service (EBS) (previously referred to as the Instructional Television Fixed Service (ITFS)). In connection with the 1996 BRS auction, the Commission established a small business size standard as an entity that had annual average gross revenues of no more than $40 million in the previous three calendar years. The BRS auctions resulted in 67 successful bidders obtaining licensing opportunities for 493 Basic Trading Areas (BTAs). Of the 67 auction winners, 61 met the definition of a small business. BRS also includes licensees of stations authorized prior to the auction. At this time, we estimate that of the 61 small business BRS auction winners, 48 remain small business licensees. In addition to the 48 small businesses that hold BTA authorizations, there are approximately 392 incumbent BRS licensees that are considered small entities. After adding the number of small business auction licensees to the number of incumbent licensees not already counted, we find that there are currently approximately 440 BRS licensees that are defined as small businesses under either the SBA or the Commission's rules. In 2009, the Commission conducted Auction 86, the sale of 78 licenses in the BRS areas. The Commission offered three levels of bidding credits: (i) A bidder with attributed average annual gross revenues that exceed $15 million and do not exceed $40 million for the preceding three years (small business) will receive a 15 percent discount on its winning bid; (ii) a bidder with attributed average annual gross revenues that exceed $3 million and do not exceed $15 million for the preceding three years (very small business) will receive a 25 percent discount on its winning bid; and (iii) a bidder with attributed average annual gross revenues that do not exceed $3 million for the preceding three years (entrepreneur) will receive a 35 percent discount on its winning bid. Auction 86 concluded in 2009 with the sale of 61 licenses. Of the ten winning bidders, two bidders that claimed small business status won 4 licenses; one bidder that claimed very small business status won three licenses; and two bidders that claimed entrepreneur status won six licenses.

118. In addition, the SBA's Cable Television Distribution Services small business size standard is applicable to EBS. There are presently 2,032 EBS licensees. All but 100 of these licenses are held by educational institutions. Educational institutions are included in this analysis as small entities. Thus, we estimate that at least 1,932 licensees are small businesses. Since 2007, Cable Television Distribution Services have been defined within the broad economic census category of Wired Telecommunications Carriers; that category is defined as follows: "This industry comprises establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired telecommunications networks. Transmission facilities may be based on a single technology or a combination of technologies." The SBA has developed a small business size standard for this category, which is: all such firms having 1,500 or fewer employees. To gauge small business prevalence for these cable services we must, however, use current census data that are based on the previous category of Cable and Other Program Distribution and its associated size standard; that size standard was: all such firms having $13.5 million or less in annual receipts. According to Census Bureau data for 2002, there were a total of 1,191 firms in this previous category that operated for the entire year. Of this total, 1,087 firms had annual receipts of under $10 million, and 43 firms had receipts of $10 million or more but less than $25 million. Thus, the majority of these firms can be considered small.

119. *Cable Television Distribution Services.* Since 2007, these services have been defined within the broad economic census category of Wired Telecommunications Carriers; that category is defined as follows: "This industry comprises establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired telecommunications networks. Transmission facilities may be based on a single technology or a combination of technologies." The SBA has developed a small business size standard for this category, which is: all such firms having 1,500 or fewer employees. To gauge small business prevalence for these cable services we must, however, use current census data that are based on the previous category of Cable and Other Program Distribution and its associated size standard; that size standard was: all such firms having $13.5 million or less in annual receipts. According to Census Bureau data for 2002, there were a total of 1,191 firms in this previous category that operated for the entire year. Of this total, 1,087 firms had annual receipts of under $10 million, and 43 firms had receipts of $10 million or more but less than $25 million. Thus, the majority of these firms can be considered small.

120. *Cable Companies and Systems.* The Commission has also developed its own small business size standards, for the purpose of cable rate regulation. Under the Commission's rules, a "small cable company" is one serving 400,000 or fewer subscribers, nationwide. Industry data indicate that, of 1,076 cable operators nationwide, all but eleven are small under this size standard. In addition, under the Commission's rules, a "small system" is a cable system serving 15,000 or fewer subscribers. Industry data indicate that, of 6,635 systems nationwide, 5,802 systems have fewer than 10,000 subscribers, and an additional 302 systems have 10,000–19,999 subscribers. Thus, under this second size standard, most cable systems are small.

121. *Cable System Operators.* The Communications Act of 1934, as amended, also contains a size standard for small cable system operators, which is "a cable operator that, directly or through an affiliate, serves in the aggregate fewer than 1 percent of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed $250,000,000." The Commission has determined that an operator serving fewer than 677,000 subscribers shall be deemed a small operator, if its annual revenues, when combined with the total annual revenues of all its affiliates, do not exceed $250 million in the aggregate. Industry data indicate that, of 1,076 cable operators nationwide, all but ten are small under this size standard. We note that the Commission neither requests nor collects information on whether cable system operators are affiliated with entities whose gross annual revenues exceed $250 million, and therefore we are unable to estimate more accurately the number of cable system operators that would qualify as small under this size standard.

122. *Open Video Systems.* The open video system (OVS) framework was established in 1996, and is one of four statutorily recognized options for the provision of video programming

services by local exchange carriers. The OVS framework provides opportunities for the distribution of video programming other than through cable systems. Because OVS operators provide subscription services, OVS falls within the SBA small business size standard covering cable services, which is "Wired Telecommunications Carriers." The SBA has developed a small business size standard for this category, which is: All such firms having 1,500 or fewer employees. To gauge small business prevalence for such services we must, however, use current census data that are based on the previous category of Cable and Other Program Distribution and its associated size standard; that size standard was: all such firms having $13.5 million or less in annual receipts. According to Census Bureau data for 2002, there were a total of 1,191 firms in this previous category that operated for the entire year. Of this total, 1,087 firms had annual receipts of under $10 million, and 43 firms had receipts of $10 million or more but less than $25 million. Thus, the majority of cable firms can be considered small. In addition, we note that the Commission has certified some OVS operators, with some now providing service. Broadband service providers (BSPs) are currently the only significant holders of OVS certifications or local OVS franchises. The Commission does not have financial or employment information regarding the entities authorized to provide OVS, some of which may not yet be operational. Thus, again, at least some of the OVS operators may qualify as small entities.

123. *Cable Television Relay Service.* This service includes transmitters generally used to relay cable programming within cable television system distribution systems. This cable service is defined within the broad economic census category of Wired Telecommunications Carriers; that category is defined as follows: "This industry comprises establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired telecommunications networks. Transmission facilities may be based on a single technology or a combination of technologies." The SBA has developed a small business size standard for this category, which is: All such firms having 1,500 or fewer employees. To gauge small business prevalence for cable services we must, however, use current census data that are based on the previous category of Cable and Other Program Distribution and its associated size standard; that size standard was: all such firms having $13.5 million or less in annual receipts. According to Census Bureau data for 2002, there were a total of 1,191 firms in this previous category that operated for the entire year. Of this total, 1,087 firms had annual receipts of under $10 million, and 43 firms had receipts of $10 million or more but less than $25 million. Thus, the majority of these firms can be considered small.

124. *Multichannel Video Distribution and Data Service.* MVDDS is a terrestrial fixed microwave service operating in the 12.2–12.7 GHz band. The Commission adopted criteria for defining three groups of small businesses for purposes of determining their eligibility for special provisions such as bidding credits. It defined a very small business as an entity with average annual gross revenues not exceeding $3 million for the preceding three years; a small business as an entity with average annual gross revenues not exceeding $15 million for the preceding three years; and an entrepreneur as an entity with average annual gross revenues not exceeding $40 million for the preceding three years. These definitions were approved by the SBA. On January 27, 2004, the Commission completed an auction of 214 MVDDS licenses (Auction No. 53). In this auction, ten winning bidders won a total of 192 MVDDS licenses. Eight of the ten winning bidders claimed small business status and won 144 of the licenses. The Commission also held an auction of MVDDS licenses on December 7, 2005 (Auction 63). Of the three winning bidders who won 22 licenses, two winning bidders, winning 21 of the licenses, claimed small business status.

125. *Internet Service Providers.* The 2007 Economic Census places these firms, whose services might include voice over Internet protocol (VoIP), in either of two categories, depending on whether the service is provided over the provider's own telecommunications connections (*e.g.* cable and DSL, ISPs), or over client-supplied telecommunications connections (*e.g.* dial-up ISPs). The former are within the category of Wired Telecommunications Carriers, which has an SBA small business size standard of 1,500 or fewer employees. The latter are within the category of All Other Telecommunications, which has a size standard of annual receipts of $25 million or less. The most current Census Bureau data for all such firms, however, are the 2002 data for the previous census category called Internet Service Providers. That category had a small business size standard of $21 million or less in annual receipts, which was revised in late 2005 to $23 million. The 2002 data show that there were 2,529 such firms that operated for the entire year. Of those, 2,437 firms had annual receipts of under $10 million, and an additional 47 firms had receipts of between $10 million and $24,999,999. Consequently, we estimate that the majority of ISP firms are small entities.

126. *Electric Power Generation, Transmission and Distribution.* The Census Bureau defines this category as follows: "This industry group comprises establishments primarily engaged in generating, transmitting, and/or distributing electric power. Establishments in this industry group may perform one or more of the following activities: (1) Operate generation facilities that produce electric energy; (2) operate transmission systems that convey the electricity from the generation facility to the distribution system; and (3) operate distribution systems that convey electric power received from the generation facility or the transmission system to the final consumer." This category includes Electric Power Distribution, Hydroelectric Power Generation, Fossil Fuel Power Generation, Nuclear Electric Power Generation, and Other Electric Power Generation. The SBA has developed a small business size standard for firms in this category: "A firm is small if, including its affiliates, it is primarily engaged in the generation, transmission, and/or distribution of electric energy for sale and its total electric output for the preceding fiscal year did not exceed 4 million megawatt hours." According to Census Bureau data for 2002, there were 1,644 firms in this category that operated for the entire year. Census data do not track electric output and we have not determined how many of these firms fit the SBA size standard for small, with no more than 4 million megawatt hours of electric output. Consequently, we estimate that 1,644 or fewer firms may be considered small under the SBA small business size standard.

127. *Natural Gas Distribution.* This economic census category comprises: "(1) Establishments primarily engaged in operating gas distribution systems (*e.g.,* mains, meters); (2) establishments known as gas marketers that buy gas from the well and sell it to a distribution system; (3) establishments known as gas brokers or agents that arrange the sale of gas over gas distribution systems operated by others; and (4) establishments primarily engaged in transmitting and distributing gas to final consumers." The SBA has developed a

small business size standard for this industry, which is: All such firms having 500 or fewer employees. According to Census Bureau data for 2002, there were 468 firms in this category that operated for the entire year. Of this total, 424 firms had employment of fewer than 500 employees, and 18 firms had employment of 500 to 999 employees. Thus, the majority of firms in this category can be considered small.

128. *Water Supply and Irrigation Systems.* This economic census category "comprises establishments primarily engaged in operating water treatment plants and/or operating water supply systems." The SBA has developed a small business size standard for this industry, which is: All such firms having $6.5 million or less in annual receipts. According to Census Bureau data for 2002, there were 3,830 firms in this category that operated for the entire year. Of this total, 3,757 firms had annual sales of less than $5 million, and 37 firms had sales of $5 million or more but less than $10 million. Thus, the majority of firms in this category can be considered small.

D. Description of Projected Reporting, Recordkeeping and Other Compliance Requirements

129. The timeline for access to poles that we adopt today will marginally affect recordkeeping and compliance requirements for utilities and attachers. We anticipate that utilities and attachers will modify their recordkeeping regarding the performance of make-ready work, including timeliness, safety, and capacity, in order to show compliance with the timeline in the case of a dispute. The notification rule requires the inclusion of certain information in make-ready notifications sent to other attachers. We also anticipate that the rule regarding the publication of qualified third-party contract workers will involve more recordkeeping for utilities that must maintain and make available the list to prospective attachers. However, we expect the costs of complying with these rules to be minimal, since they do not measurably differ from the requirements in place before the adoption of this Order.

130. The changes we adopt today in the enforcement process, specifically for pole attachment complaints, similarly do not produce significant differences in recordkeeping and compliance requirements from the requirements in place before the adoption of this Order. For example, although our decision to permit recovery of a monetary award to extend as far back as the appropriate statute of limitations allows, rather than beginning the award period with the filing of the complaint, may increase the period of time over which a complainant must produce data to support its monetary claim, we have not adopted any requirements of data collection or filing *per se.*

131. We expect the costs of complying with the new rules affecting attachment rates to be minimal, since any of these compliance costs do not significantly differ from requirements in place before the adoption of this Order.

E. Steps Taken to Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered

132. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include (among others) the following four alternatives: (1) The establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.

133. The specific timeline and additional rules adopted in this Order provide a predictable, timely process for parties to seek and obtain pole attachments, while maintaining a utility's interest in preserving safety, reliability, and sound engineering. We do not adopt different requirements for small entities because we expect the economic impact on small entities to be minimal. Since we cap the number of poles subject to the timeline based on the lesser of a numerical cap or a percentage of poles owned by a utility in a state, small entities do not undergo any disproportionate hardship. The 100 pole order cap proposed by NTCA *et al.* does not achieve the same benefit for small entities because it is not specifically tailored to the size of the entity. Also, it is unlikely that the timeline will result in any significant recordkeeping burdens for small entities since prudent utilities and attachers already keep records regarding make-ready work and pole capacity and we do not impose any additional information collection requirements. Similarly, identifying the contractors that utilities themselves already use to prospective attachers should not require an additional resource burden. Finally, the Commission does not have authority to regulate (and the proposed rules, thus, do not apply to) small utilities that are municipally or cooperatively owned.

134. Further, in this Order, the Commission revises the section 224(e) rental rate for pole attachments used by telecommunications carriers to provide telecommunications services. This new telecom rate generally will recover the same portion of pole costs as the current cable rate. The new formula will minimize the difference in rental rates paid for attachments that are used to provide voice, data, and video services, and thus will help remove market distortions that pose barriers to deployment of new services by small cable and telecommunications providers. The Commission also revisits its prior interpretation of the statute and allows incumbent LECs to file pole attachment complaints before the Commission if they are unable to negotiate just and reasonable rates, terms, and conditions with other pole owners. Thus, we believe that the rules adopted in this Order to ensure that pole attachment rates are just and reasonable will have a positive economic benefit on small entities in areas that fall under the Commission's regulatory jurisdiction, rather than an adverse impact.

135. Specifically, NTCA *et al.* asserts that small rural incumbent LECs are concerned about unreasonably high rates and "face difficulties in negotiating and, in some cases, litigating contractual terms for pole attachments." NCTA *et al.* also asserts that "[t]he Commission's current pole attachment rules effectively deny rural ILECs a remedy against unreasonable pole attachment provisions which has a significant economic impact on a substantial number of small ILECs." NTCA requested that the Commission adopt a "remedy mechanism by which [rural ILECs] can present claims of unjust or unreasonable pole attachment rates, terms and conditions imposed by utilities"—and stated that such a provision "would reduce the economic impact on small rural communications providers." The Commission, in fact, adopts such a rule in this Order—allowing incumbent LECs to file pole attachment complaints. Further, the Commission provides guidance regarding its approach to evaluating those complaints and what the appropriate rate may be.

136. Also in this Order, the Commission responds to small cable operator concerns about "possible increases in rates for comingled Internet and video services," as noted by the U.S. Small Business Administration. Addressing the role of the new telecom rate in the context of commingled

services, the Commission recognized concerns by some cable operators that pole owners may seek to impose rates higher than both the cable rate and the new telecom rate where cable operators or telecommunications carriers also provide services, such as VoIP, that have not been classified. The Commission stated that this outcome would be contrary to its policy goals here in which it adopts a lower and more uniform attachment rate to reduce the disparity in pole rental rates among providers of competing services to minimize disputes resulting from the disparity between cable and pre-existing higher telecom rates. This disparity has acted to deter investment and network expansion for new services by cable providers because of the risk that some of those services could potentially be classified as "telecommunications services"—triggering disputes and litigation as to whether the higher telecom rate should be applied over their entire pole attachment network. The Commission also makes clear that the use of pole attachments by telecommunications carriers or cable operators to provide commingled services does not remove them from the pole rate regulation framework, and that rates generally will not be considered just and reasonable if they exceed the new telecom rate.

137. In addition, the new rate for attachments used by telecommunications carriers will have a positive economic impact on small competitive LECs. It will minimize competitive disadvantages that these carriers faced by having to pay higher rates for these key inputs to communications services. The Order also confirms that wireless carriers are entitled to the same rate under the statute as other telecommunications carriers. Specifically, the Commission explains that wireless carriers are entitled to the benefits and protection of section 224, including the right to the telecom rate under section 224(e), in response to reports by the wireless industry of cases where wireless providers were not afforded the regulated rate and instead had been charged higher rates that were unreasonable.

F. Federal Rules That May Duplicate, Overlap, or Conflict With the Proposed Rules

138. None.

Ordering Clauses

Accordingly, *it is ordered* that pursuant to sections 1, 4(i), 4(j), 224, 251(b)(4), and 303, of the Communications Act of 1934, as amended, and section 706 of the Telecommunications Act of 1996, as amended, 47 U.S.C. 151, 154(i), 154(j), 224, 251(b)(4), 303(r), 1302, this Report and Order and Order on Reconsideration *is adopted.*

It is further ordered that part 1 of the Commission's rules *is amended* as set forth in Appendix A.

It is further ordered that, pursuant to §§ 1.4(b)(1) and 1.103(a) of the Commission's rules, 47 CFR 1.4(b)(1), 1.103(a), this Report and Order and Order on Reconsideration *shall become effective* June 8, 2011. The information collection requirements contained in the Report and Order will become effective following OMB approval.

It is further ordered that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, *shall send* a copy of this Report and Order and Order on Reconsideration, including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

List of Subjects in 47 CFR Part 1

Administrative practices and procedure, Cable television, Communications common carriers, Communications equipment, Telecommunications, Telephone, Television.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

Final Rules

For the reasons discussed in the preamble, the Federal Communications Commission amends 47 CFR part 1 to read as follows:

PART 1—PRACTICE AND PROCEDURE

■ 1. The authority citation for part 1 continues to read as follows:

Authority: 15 U.S.C. 79 *et seq.;* 47 U.S.C. 151, 154(i), 154(j), 155, 160, 201, 225, and 303.

Subpart J—Pole Attachment Complaint Procedures

■ 2. Revise § 1.1401 to read as follows:

§ 1.1401 Purpose.

The rules and regulations contained in subpart J of this part provide complaint and enforcement procedures to ensure that telecommunications carriers and cable system operators have nondiscriminatory access to utility poles, ducts, conduits, and rights-of-way on rates, terms, and conditions that are just and reasonable. They also provide complaint and enforcement procedures for incumbent local exchange carriers (as defined in 47 U.S.C. 251(h)) to ensure that the rates, terms, and conditions of their access to pole attachments are just and reasonable.

■ 3. Section 1.1402 is amended by revising paragraphs (d) and (e) to read as follows:

§ 1.1402 Definitions.

* * * * *

(d) The term *complaint* means a filing by a cable television system operator, a cable television system association, a utility, an association of utilities, a telecommunications carrier, or an association of telecommunications carriers alleging that it has been denied access to a utility pole, duct, conduit, or right-of-way in violation of this subpart and/or that a rate, term, or condition for a pole attachment is not just and reasonable. It also means a filing by an incumbent local exchange carrier (as defined in 47 U.S.C. 251(h)) or an association of incumbent local exchange carriers alleging that a rate, term, or condition for a pole attachment is not just and reasonable.

(e) The term *complainant* means a cable television system operator, a cable television system association, a utility, an association of utilities, a telecommunications carrier, an association of telecommunications carriers, an incumbent local exchange carrier (as defined in 47 U.S.C. 251(h)) or an association of incumbent local exchange carriers who files a complaint.

* * * * *

■ 4. Section 1.1404 is amended by revising paragraphs (g)(1)(ix), (k) and (m) to read as follows:

§ 1.1404 Complaint.

* * * * *

(g) * * *

(1) * * *

(ix) The annual carrying charges attributable to the cost of owning a pole. The utility shall submit these charges separately for each of the following categories: Depreciation, rate of return, taxes, maintenance, and administrative. These charges may be expressed as a percentage of the net pole investment. With its pleading, the utility shall file a copy of the latest decision of the state regulatory body or state court that determines the treatment of accumulated deferred taxes if it is at issue in the proceeding and shall note the section that specifically determines the treatment and amount of accumulated deferred taxes.

* * * * *

(k) The complaint shall include a certification that the complainant has,

in good faith, engaged or attempted to engage in executive-level discussions with the respondent to resolve the pole attachment dispute. Executive-level discussions are discussions among representatives of the parties who have sufficient authority to make binding decisions on behalf of the company they represent regarding the subject matter of the discussions. Such certification shall include a statement that, prior to the filing of the complaint, the complainant mailed a certified letter to the respondent outlining the allegations that form the basis of the complaint it anticipated filing with the Commission, inviting a response within a reasonable period of time, and offering to hold executive-level discussions regarding the dispute. A refusal by a respondent to engage in the discussions contemplated by this rule shall constitute an unreasonable practice under section 224 of the Act.

* * * * *

(m) In a case where a cable television system operator or telecommunications carrier as defined in 47 U.S.C. 224(a)(5) claims that it has been denied access to a pole, duct, conduit or right-of-way despite a request made pursuant to section 47 U.S.C. 224(f), the complaint shall include the data and information necessary to support the claim, including:

(1) The reasons given for the denial of access to the utility's poles, ducts, conduits, or rights-of-way;

(2) The basis for the complainant's claim that the denial of access is unlawful;

(3) The remedy sought by the complainant;

(4) A copy of the written request to the utility for access to its poles, ducts, conduits, or rights-of-way; and

(5) A copy of the utility's response to the written request including all information given by the utility to support its denial of access. A complaint alleging unlawful denial of access will not be dismissed if the complainant is unable to obtain a utility's written response, or if the utility denies the complainant any other information needed to establish a prima facie case.

■ 5. Section 1.1409 is amended by revising paragraph (e)(2) to read as follows:

§ 1.1409 Commission consideration of the complaint.

* * * * *

(e) * * *

(2) With respect to attachments to poles by any telecommunications carrier or cable operator providing telecommunications services, the maximum just and reasonable rate shall be the higher of the rate yielded by paragraphs (e)(2)(i) or (e)(2)(ii) of this section.

(i) The following formula applies to the extent that it yields a rate higher than that yielded by the applicable formula in paragraph 1.1409(e)(2)(ii) of this section:

Rate = Space Factor × Cost

Where Cost

in Urbanized Service Areas = 0.66 × (Net Cost of a Bare Pole × Carrying Charge Rate)

in Non-Urbanized Service Areas = 0.44 × (Net Cost of a Bare Pole × Carrying Charge Rate).

$$\text{Where Space Factor} = \left[\frac{\left(\frac{\text{Space}}{\text{Occupied}} \right) + \left(\frac{2}{3} \times \frac{\text{Unusable Space}}{\text{No. of Attaching Entities}} \right)}{\text{Pole Height}} \right]$$

(ii) The following formula applies to the extent that it yields a rate higher than that yielded by the applicable formula in paragraph 1.1409(e)(2)(i) of this section:

$$\text{Rate} = \text{Space Factor} \times \text{Net Cost of a Bare Pole} \times \left[\frac{\text{Maintenance and Administrative}}{\text{Carrying Charge Rate}} \right]$$

$$\text{Where Space Factor} = \left[\frac{\left(\frac{\text{Space}}{\text{Occupied}} \right) + \left(\frac{2}{3} \times \frac{\text{Unusable Space}}{\text{No. of Attaching Entities}} \right)}{\text{Pole Height}} \right]$$

* * * * *

■ 6. Section 1.1410 is amended by revising paragraphs (a) and (b) to read as follows:

§ 1.1410 Remedies.

* * * * *

(a) If the Commission determines that the rate, term, or condition complained of is not just and reasonable, it may prescribe a just and reasonable rate, term, or condition and may:

(1) Terminate the unjust and/or unreasonable rate, term, or condition;

(2) Substitute in the pole attachment agreement the just and reasonable rate, term, or condition established by the Commission;

(3) Order a refund, or payment, if appropriate. The refund or payment will normally be the difference between the amount paid under the unjust and/or unreasonable rate, term, or condition and the amount that would have been paid under the rate, term, or condition established by the Commission, plus interest, consistent with the applicable statute of limitations; and

(b) If the Commission determines that access to a pole, duct, conduit, or right-

of-way has been unlawfully denied or delayed, it may order that access be permitted within a specified time frame and in accordance with specified rates, terms, and conditions.

* * * * *

■ 7. Add § 1.1420 to subpart J to read as follows:

§ 1.1420 Timeline for access to utility poles.

(a) The term "attachment" means any attachment by a cable television system or provider of telecommunications service to a pole owned or controlled by a utility.

(b) All time limits in this subsection are to be calculated according to § 1.4.

(c) *Survey.* A utility shall respond as described in § 1.1403(b) to a cable operator or telecommunications carrier within 45 days of receipt of a complete application to attach facilities to its utility poles (or within 60 days, in the case of larger orders as described in paragraph (g) of this section). This response may be a notification that the utility has completed a survey of poles for which access has been requested. A complete application is an application that provides the utility with the information necessary under its procedures to begin to survey the poles.

(d) *Estimate.* Where a request for access is not denied, a utility shall present to a cable operator or telecommunications carrier an estimate of charges to perform all necessary make-ready work within 14 days of providing the response required by § 1.1420(c), or in the case where a prospective attacher's contractor has performed a survey, within 14 days of receipt by the utility of such survey.

(1) A utility may withdraw an outstanding estimate of charges to perform make-ready work beginning 14 days after the estimate is presented.

(2) A cable operator or telecommunications carrier may accept a valid estimate and make payment anytime after receipt of an estimate but before the estimate is withdrawn.

(e) *Make-ready.* Upon receipt of payment specified in paragraph (d)(2) of this section, a utility shall notify immediately and in writing all known entities with existing attachments that may be affected by the make-ready.

(1) For attachments in the communications space, the notice shall:

(i) Specify where and what make-ready will be performed.

(ii) Set a date for completion of make-ready that is no later than 60 days after notification is sent (or 105 days in the case of larger orders, as described in paragraph (g) of this section).

(iii) State that any entity with an existing attachment may modify the attachment consistent with the specified make-ready before the date set for completion.

(iv) State that the utility may assert its right to 15 additional days to complete make-ready.

(v) State that if make-ready is not completed by the completion date set by the utility (or, if the utility has asserted its 15-day right of control, 15 days later), the cable operator or telecommunications carrier requesting access may complete the specified make-ready.

(vi) State the name, telephone number, and e-mail address of a person to contact for more information about the make-ready procedure.

(2) For wireless attachments above the communications space, the notice shall:

(i) Specify where and what make-ready will be performed.

(ii) Set a date for completion of make-ready that is no later than 90 days after notification is sent (or 135 days in the case of larger orders, as described in paragraph (g) of this section).

(iii) State that any entity with an existing attachment may modify the attachment consistent with the specified make-ready before the date set for completion.

(iv) State that the utility may assert its right to 15 additional days to complete make-ready.

(v) State the name, telephone number, and e-mail address of a person to contact for more information about the make-ready procedure.

(f) For wireless attachments above the communications space, a utility shall ensure that make-ready is completed by the date set by the utility in paragraph (e)(2)(ii) of this section (or, if the utility has asserted its 15-day right of control, 15 days later).

(g) For the purposes of compliance with the time periods in this section:

(1) A utility shall apply the timeline described in paragraphs (c) through (e) of this section to all requests for pole attachment up to the lesser of 300 poles or 0.5 percent of the utility's poles in a state.

(2) A utility may add 15 days to the survey period described in paragraph (c) of this section to larger orders up to the lesser of 3000 poles or 5 percent of the utility's poles in a state.

(3) A utility may add 45 days to the make-ready periods described in paragraph (e) of this section to larger orders up to the lesser of 3000 poles or 5 percent of the utility's poles in a state.

(4) A utility shall negotiate in good faith the timing of all requests for pole attachment larger than the lesser of 3000 poles or 5 percent of the utility's poles in a state.

(5) A utility may treat multiple requests from a single cable operator or telecommunications carrier as one request when the requests are filed within 30 days of one another.

(h) A utility may deviate from the time limits specified in this section:

(1) Before offering an estimate of charges if the parties have no agreement specifying the rates, terms, and conditions of attachment.

(2) During performance of make-ready for good and sufficient cause that renders it infeasible for the utility to complete the make-ready work within the prescribed time frame. A utility that so deviates shall immediately notify, in writing, the cable operator or telecommunications carrier requesting attachment and other affected entities with existing attachments, and shall include the reason for and date and duration of the deviation. The utility shall deviate from the time limits specified in this section for a period no longer than necessary and shall resume make-ready performance without discrimination when it returns to routine operations.

(i) If a utility fails to respond as specified in paragraph (c) of this section, a cable operator or telecommunications carrier requesting attachment in the communications space may, as specified in § 1.1422, hire a contractor to complete a survey. If make-ready is not complete by the date specified in paragraph (e)(1)(ii) of this section, a cable operator or telecommunications carrier requesting attachment in the communications space may hire a contractor to complete the make-ready:

(1) Immediately, if the utility has failed to assert its right to perform remaining make-ready work by notifying the requesting attacher that it will do so; or

(2) After 15 days if the utility has asserted its right to perform make-ready by the date specified in paragraph (e)(1)(ii) of this section and has failed to complete make-ready.

■ 8. Add § 1.1422 to subpart J to read as follows:

§ 1.1422 Contractors for survey and make-ready.

(a) A utility shall make available and keep up-to-date a reasonably sufficient list of contractors it authorizes to perform surveys and make-ready in the communications space on its utility poles in cases where the utility has failed to meet deadlines specified in § 1.1420.

(b) If a cable operator or telecommunications carrier hires a contractor for purposes specified in § 1.1420, it shall choose from among a utility's list of authorized contractors.

(c) A cable operator or telecommunications carrier that hires a contractor for survey or make-ready work shall provide a utility with a reasonable opportunity for a utility representative to accompany and consult with the authorized contractor and the cable operator or telecommunications carrier.

(d) The consulting representative of an electric utility may make final determinations, on a nondiscriminatory basis, where there is insufficient capacity and for reasons of safety, reliability, and generally applicable engineering purposes.

■ 9. Add § 1.1424 to subpart J to read as follows:

§ 1.1424 Complaints by incumbent local exchange carriers.

Complaints by an incumbent local exchange carrier (as defined in 47 U.S.C. 251(h)) or an association of incumbent local exchange carriers alleging that a rate, term, or condition for a pole attachment is not just and reasonable shall follow the same complaint procedures specified for other pole attachment complaints in this part, as relevant. In complaint proceedings where an incumbent local exchange carrier (or an association of incumbent local exchange carriers) claims that it is similarly situated to an attacher that is a telecommunications carrier (as defined in 47 U.S.C. 251(a)(5)) or a cable television system for purposes of obtaining comparable rates, terms or conditions, the incumbent local exchange carrier shall bear the burden of demonstrating that it is similarly situated by reference to any relevant evidence, including pole attachment agreements. If a respondent declines or refuses to provide a complainant with access to agreements or other information upon reasonable request, the complainant may seek to obtain such access through discovery. Confidential information contained in any documents produced may be subject to the terms of an appropriate protective order.

[FR Doc. 2011–11137 Filed 5–6–11; 8:45 am]

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FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 64

[CG Docket No. 10–210; FCC 11–56]

Relay Services for Deaf-Blind Individuals

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: In this document, the Commission adopts rules to establish the National Deaf-Blind Equipment Distribution Program (NDBEDP) pilot program in accordance with the Twenty-First Century Communications and Video Accessibility Act of 2010 (CVAA). The CVAA adds a new section to the Communications Act of 1934, as amended (the Act). This new section of the Act requires the Commission to establish rules that define as eligible for support those programs approved by the Commission for the distribution of specialized customer premises equipment (CPE) to low-income individuals who are deaf-blind. For these purposes, this new section of the Act authorizes $10 million annually from the Interstate Telecommunications Relay Service (TRS) Fund. The equipment distributed under the NDBEDP pilot program will make telecommunications service, Internet access service, and advanced communications, including interexchange services and advanced telecommunications and information services, accessible to individuals who are deaf-blind.

DATES: Effective June 8, 2011, except for 47 CFR 64.610(b), (e)(1)(ii), (viii), and (ix), (f), and (g), which contain information collection requirements subject to the Paperwork Reduction Act (PRA) that have not been approved by the Office of Management and Budget (OMB). The Commission will publish a document in the **Federal Register** announcing the effective date of these requirements. Written comments by the public on the new information collections are due July 8, 2011.

ADDRESSES: Federal Communications Commission, 445 12th Street, SW., Washington, DC 20554. In addition to filing comments with the Secretary, a copy of any comments on the information collection requirements contained herein should be submitted to Cathy Williams, Federal Communications Commission via e-mail at *PRA@fcc.gov* and *Cathy.Williams@fcc.gov.*

FOR FURTHER INFORMATION CONTACT: Rosaline Crawford, Consumer and Governmental Affairs Bureau, Disability Rights Office, at (202) 418–2075 or e-mail *Rosaline.Crawford@fcc.gov.*

For additional information concerning the PRA information collection requirements contained in this document, contact Cathy Williams, Federal Communications Commission, at (202) 418–2918, or via e-mail *Cathy.Williams@fcc.gov.*

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's National Deaf-Blind Equipment Distribution Program (NDBEDP) Report and Order (*Order*), document FCC 11–56, adopted April 4, 2011, and released April 6, 2011, in CG Docket No. 10–210.

The full text of document FCC 11–56 and copies of any subsequently filed documents in this matter will be available for public inspection and copying via ECFS, and during regular business hours at the FCC Reference Information Center, Portals II, 445 12th Street, SW., Room CY–A257, Washington, DC 20554. They may also be purchased from the Commission's duplicating contractor, Best Copy and Printing, Inc., Portals II, 445 12th Street, SW., Room CY–B402, Washington, DC 20554, *telephone:* (800) 378–3160, fax: (202) 488–5563, or *Internet: www.bcpiweb.com.* Document FCC 11–56 can also be downloaded in Word or Portable Document Format (PDF) at *http://www.fcc.gov/cgb/dro/headlines.html* and at *http://www.fcc.gov/cgb/dro/cvaa.html.*

To request materials in accessible formats for people with disabilities (Braille, large print, electronic files, audio format), send an e-mail to *fcc504@fcc.gov* or call the Consumer and Governmental Affairs Bureau at 202–418–0530 (voice), 202–418–0432 (TTY).

Final Paperwork Reduction Act of 1995 Analysis

This document contains new and modified information collection requirements. The Commission, as part of its continuing effort to reduce paperwork burdens, invites the general public to comment on the information collection requirements contained in document FCC 11–56 as required by the PRA of 1995, Public Law 104–13. In addition, the Commission notes that pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107–198, the Commission previously sought specific comment on how the Commission might "further reduce the information collection burden for small business concerns with

fewer than 25 employees." *See* 44 U.S.C. 3506(c)(4). In this present document, the Commission has assessed the effects of the rules for the NDBEDP pilot program and finds that the collection of information requirements will not have a significant impact on small business concerns with fewer than 25 employees.

Congressional Review Act

The Commission will send a copy of document FCC 11–56 in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act. *See* 5 U.S.C. 801(a)(1)(A).

Synopsis

1. Document FCC 11–56 implements a provision of the CVAA, Public Law 111–260, 124 Stat. 2751 (2010). (*See also* Pub. L. 111–265, 124 Stat. 2795 (2010) (making technical corrections to the CVAA)). Section 105 of the CVAA adds section 719, 47 U.S.C. 620, to the Communications Act of 1934, as amended (the Act). Section 719 of the Act requires the Commission to establish rules that define as eligible for relay service support those programs approved by the Commission for the distribution of specialized customer premises equipment (CPE) to low-income individuals who are deaf-blind. 47 U.S.C. 620(a). The CVAA authorizes the Commission to allocate $10 million annually from the Interstate Telecommunications Relay Service (TRS) Fund for this equipment distribution effort. 47 U.S.C. 620(c). In document FCC 11–56, the Commission establishes a National Deaf-Blind Equipment Distribution Program (NDBEDP) pilot program to certify and provide funding to one entity in each state to distribute specialized CPE to make telecommunications service, Internet access service, and advanced communications, including interexchange services and advanced telecommunications and information services, accessible to low-income individuals who are deaf-blind.

2. Prior to the adoption of document FCC 11–56, the Consumer and Governmental Affairs Bureau (CGB) issued a Public Notice on November 3, 2010, seeking comment on a range of issues related to the Commission's implementation of section 719 of the Act. *See Consumer and Governmental Affairs Bureau Seeks Comment on Implementation of Requirement to Define Programs for Distribution of Specialized Customer Premises Equipment Used by Individuals who are Deaf-Blind,* Public Notice, document DA–10–2112, released November 3, 2010 in CG Docket No. 10–210 (*NDBEDP PN*). The comments filed in response to the *NDBEDP PN* informed the preparation of a Notice of Proposed Rulemaking that the Commission released on January 14, 2011. *See Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010, Section 105, Relay Services for Deaf-Blind Individuals,* Notice of Proposed Rulemaking, published at 76 FR 4838, January 27, 2011 (*NDBEDP NPRM*). In the *NDBEDP NPRM,* the Commission proposed ways to support the distribution of specialized CPE to enhance and promote access to telecommunications service, Internet access service, and advanced communications by low-income individuals who are deaf-blind, and sought comment on those proposals. The NDBEDP pilot program, established by the rules adopted in document FCC 11–56, will support the distribution of such specialized CPE and the provision of associated services, as well as help to inform future Commission action in establishing a more permanent NDBEDP.

Pilot Program

3. In document FCC 11–56, the Commission adopts a rule permitting all qualified entities to apply for certification to participate in the NDBEDP. The Commission will then select among these program applicants based on the criteria set out in the NDBEDP pilot program rules. Program applicants may include recommendations with their certification applications from members of the deaf-blind community in their state, appropriate experts, or others with direct knowledge of their capabilities and qualifications. The Commission will certify only one entity per state as eligible to receive support for the distribution of equipment to individuals who are deaf-blind. Each certified entity will have primary oversight and responsibility for compliance with program requirements, but certified entities may fulfill their responsibilities either directly or through collaboration, partnership, or contract with other individuals or entities in-state or out-of-state (including other state EDPs).

4. The Commission will require the submission of certification applications within 60 days after the effective date of these rules. These rules will be effective upon notice in the **Federal Register** announcing OMB approval of the information collection requirements subject to the Paperwork Reduction Act. The Commission will announce the selected participants, starting date, and funding allocations as soon as possible thereafter. Certification will be granted for the duration of the pilot program, subject to compliance with program requirements.

5. The Commission will operate the NDBEDP pilot for two years, from the pilot program start date, with an option for to extend the program for an additional year. The Commission delegates authority to CGB to establish the pilot program start date, as soon as possible, but not later than July 1, 2012, the start of the 2012–2013 TRS Fund year. The Commission believes that the experiences and information gained during this pilot program will provide it with a comprehensive understanding of how to ensure the most efficient and effective use of the funds available to meet the needs of this population on a more permanent basis.

Consumer Eligibility

6. *Definition of Individuals who are Deaf-Blind.* Under the CVAA, persons eligible to receive equipment under the NDBEDP must be "deaf-blind," as this term is defined by the Helen Keller National Center Act (HKNC Act), 29 U.S.C. 1905(2). That definition contains three prongs. The first prong of the definition requires assessment of the individual's vision, and provides measurable standards of loss of visual acuity. The second prong asks whether the individual has a hearing loss so severe "that most speech cannot be understood with optimum amplification." The third prong asks whether the individual's combined visual and hearing losses "cause extreme difficulty in attaining independence in daily life activities, achieving psychosocial adjustment, or obtaining a vocation." The Commission directs certified programs to consider an individual's functional abilities with respect to using telecommunications, Internet access, and advanced communications services in various environments, when they make determinations as to whether an individual is deaf-blind under the second and third prongs of the definition.

7. *Verification of Disability.* NDBEDP applicants who are deaf-blind are likely to face significant logistical challenges, including the very types of communication barriers the NDBEDP is itself designed to eliminate, in their attempts to obtain verification of their disabilities. To facilitate access to the NDBEDP by the intended population, while at the same time implementing measures to prevent potential fraud or abuse of this program, the Commission adopts a rule requiring an individual seeking equipment under the NDBEDP

to provide verification of his or her disability from any practicing professional that has direct knowledge of that individual's disability. For the pilot program, such professional must verify the individual's disability to the best of his or her knowledge. Also, for purposes of the pilot program, the Commission will accept existing documentation as verification that a person is deaf-blind, such as an individualized education program (IEP) that indicates that the person receiving equipment is deaf-blind, or a statement from a public or private agency, such as a Social Security determination letter that a person is deaf-blind. The Commission also adopts a requirement that such verification of disability include the attesting name, title, and contact information, including address, phone number, and e-mail address of the professional.

8. *Income Eligibility.* Section 719 of the Act limits NDBEDP eligibility to "low-income" individuals. The Commission concludes that the unusually high medical and disability-related costs incurred by individuals who are deaf-blind discussed in the comments, together with the extraordinarily high costs of specialized CPE typically needed by this population, support an income eligibility rule of 400 percent of the Federal Poverty Guidelines (FPG) for the NDBEDP pilot program. NDBEDP certified programs will not be permitted to apply income eligibility limits that are lower than the limit the Commission adopts. State EDPs or alternate entities with income eligibility criteria for other programs they administer that are different from the NDBEDP criteria may still be certified under the NDBEDP, but they must use NDBEDP-compliant income eligibility criteria to assess individuals who will participate in the federal NDBEDP pilot.

9. *Verification of Income Eligibility.* The Commission adopts a rule to allow individuals enrolled in federal subsidy programs with income thresholds lower than 400 percent of the FPG threshold to automatically be deemed income eligible for the NDBEDP pilot program. The Commission also adopts a rule that permits the NDBEDP Administrator to authorize other federal or state programs with income eligibility thresholds that do not exceed 400 percent of the FPG to be the basis for determining income eligibility under the NDBEDP. Where applicants are not already enrolled in a qualifying low-income program, low-income eligibility must be verified by the certified program using appropriate and reasonable means, for example, by reviewing the individual's most recent income tax return.

10. *Other Eligibility Requirements and Considerations.* During the NDBEDP pilot program, the Commission will permit certified programs to require that NDBEDP equipment recipients demonstrate that they have access to the telecommunications service, Internet access service, and advanced communications that the equipment is designed to use and make accessible. States choosing to impose this qualification criterion must allow access to such services to be in the form of wireless, WiFi, or other free services made available by public or private entities, or by the recipient's family, friends, neighbors, or other personal contacts. However, the Commission prohibits certified programs from adopting or imposing any employment-related eligibility requirement as there is no statutory basis for such a requirement under the CVAA. Requiring NDBEDP recipients to be employed or actively seeking employment would limit the scope of the NDBEDP, potentially excluding children, students, retirees, and senior citizens.

Covered Equipment and Related Services

11. *Scope of Specialized Customer Premises Equipment.* The Commission's rules require covered equipment and technology eligible for distribution under the NDBEDP to be defined broadly, without restrictions on specific brands, models, or types of technology, including hardware, software, and applications, separately or in combination, needed to achieve access. During the NDBEDP pilot program, certified programs will have the discretion to determine the specific equipment needed and to be provided, as long as that equipment can make telecommunications service, Internet access service, and advanced communications accessible by the consumer who is deaf-blind. Certified programs may not be limited by state statute or otherwise to distribute equipment to make only some communications accessible; certified programs must be permitted to distribute equipment to enable deaf-blind individuals to access the full spectrum of communication covered under section 719 of the Act, as needed by those individuals. The Commission further concludes that certified programs may distribute "off-the-shelf" equipment to serve as specialized CPE, or as needed for use with specialized CPE, as long as it meets the needs of an individual covered under this program. The Commission will examine the kinds of equipment that are requested and distributed during the NDBEDP pilot program to assess both the demand for varied technologies and to make any necessary adjustments in the scope of covered equipment when the Commission conducts the rulemaking proceeding for the permanent program. The Commission also prohibits certified programs from disabling or making more difficult to access capabilities, functions, or features on distributed equipment that are needed to access communications services covered by section 719 of the Act, for example, by having the manufacturer bury access to those functions into deeper menus.

12. Because of the lack of consensus in the record, and because the Commission would like to first gather experience under the NDBEDP on the costs associated with the various devices and services that will be funded under the certified programs, the Commission will not establish caps on the quantity or cost of equipment distributed to individuals during this pilot program. Certified programs may distribute new equipment or equipment upgrades to keep current with changes in technology and individual needs. Certified programs may also distribute more than one device to an individual who is deaf-blind to achieve access to more than one type of covered communications service or to achieve such access in more than one setting. Equipment distribution is subject to the constraints of the state's annual funding allocation, and the desire to make communications accessible for as many individuals who are deaf-blind as possible.

13. *Loan Versus Ownership.* While the Commission strongly recommends that certified programs lend equipment distributed under the NDBEDP to equipment recipients, the Commission does not require that they use this method of distributing equipment. For those programs that choose to lend equipment, the Commission requires that recipients be permitted to keep their devices for as long as needed. Under either a "loan" or "ownership" program, equipment recipients should not be permitted to sell, give away, or otherwise transfer equipment distributed under the NDBEDP. When a recipient relocates to another state, the certified program must transfer the recipient's account and any control of the distributed equipment to the new state's certified program, so that the individual need not reapply.

14. *Research and Development.* The Commission recognizes that there are equipment and technology gaps in the communications technology currently

available to the deaf-blind population. However, the Commission concludes that an allocation of NDBEDP funding for equipment research and development is not appropriate at this time because of insufficient information about those gaps and the kinds of research and funding that are needed to fill them.

15. *Individualized Assessment of Communication Needs.* The Commission concludes that qualified assistive technology specialists who are familiar with both the manner in which deaf-blind people communicate and the range of specialized equipment that is available under this program are necessary to ensure that the equipment provided to deaf-blind individuals effectively meets their needs. Accordingly, certified programs may be reimbursed for the reasonable costs of making individualized assessments of a deaf-blind consumer's communications needs during the NDBEDP pilot. The reasonable costs of travel to conduct individual assessments of applicants who are located in rural or remote areas may also be covered when necessary to support the distribution of equipment by certified programs.

16. *Installation and Training.* Based on the record in this proceeding, the Commission concludes that equipment installation and individualized consumer training on how to use the distributed equipment are essential to the efficient and effective distribution of equipment for use by people who are deaf-blind and, as such, the reasonable costs associated with these services will be compensable for programs certified under section 719 of the Act. The Commission recognizes that there is a shortage of qualified personnel who can provide individualized training for equipment distributed to persons who are deaf-blind. However, because of the limited funding available in this program, and because the record is not clear on how programs to "train the trainer" should be set up at this time, the Commission will not set aside NDBEDP funds or reimburse certified programs for the costs of such training programs. The Commission does, however, encourage certified programs to maximize the use of limited resources through collaboration and partnerships between and among certified NDBEDP programs on a national or regional basis, as well as partnerships or contracts with other individuals and entities, in-state or out-of-state, in order to locate qualified individuals who can provide appropriate and effective training to people who are deaf-blind.

17. *Maintenance, Repairs, and Warranties.* The Commission concludes that, for the NDBEDP pilot program, reasonable costs associated with equipment maintenance and repairs that are not covered under warranties are eligible for reimbursement, except when such repair costs are the result of consumer or program negligence or misuse. The Commission encourages NDBEDP certified programs or manufacturers to provide equipment that can be loaned to the consumer during periods of equipment repair, especially when such equipment is under warranty. Reasonable costs associated with maintaining an inventory of equipment that can be loaned to the consumer during periods of equipment repair will also be covered under the NDBEDP pilot program. The Commission recommends that certified programs establish policies and the means for consumers to return equipment that is no longer needed or used to the certified program for possible refurbishing and redistribution. The reasonable costs of such return and refurbishing will be covered under the NDBEDP. The reasonable costs of warranties covering maintenance, updates, and repairs will also be covered during the pilot program.

18. *Outreach and Education.* The Commission concludes that a wide variety of outreach efforts is needed to reach the diverse population of individuals who are deaf-blind to make the NDBEDP effective. Certified programs participating in the pilot program must conduct outreach to inform residents of their states who are deaf-blind about the NDBEDP. Such outreach may include, but is not limited to, the development and maintenance of a program Web site and the distribution of accessible information and materials. The Commission also directs the NDBEDP Administrator to establish a Web site, accessible to deaf-blind consumers, that contains information about the NDBEDP. To supplement the outreach efforts of NDBEDP certified programs, the Commission will set aside $500,000 for outreach on a national level during each TRS Fund year of the pilot program. This outreach may be conducted by entities that have significant experience with and expertise in working with the deaf-blind community or by others and the Commission delegates authority to CGB to select appropriate entities to conduct outreach.

Funding

19. *Allocation.* The Commission will make the full amount of authorized funding, $10 million, available to the NDBEDP during each TRS Fund year (July 1 through June 30) of this pilot program. Insofar as $500,000 will be set aside for a nationwide outreach effort, a total of $9.5 million will be available for initial allocations among certified programs during each of the Fund years of this NDBEDP pilot program. Annual funding for the pilot program will be allocated on the basis of the population of each state. To ensure that every certified program in the NDBEDP pilot program receives a level of support that will both provide it with the incentive to participate in the NDBEDP and permit the distribution of equipment to as many eligible residents as possible, the Commission will allocate a minimum base amount of $50,000 to each state per TRS Fund year during the pilot program, with the balance of available funds allocated in proportion to the population of each of these jurisdictions.

20. *Funding Mechanism.* The Commission concludes that a mechanism that allocates funding for reimbursement of authorized costs of equipment and associated services, up to each state's initial or adjusted allotment, is appropriate for the NDBEDP pilot program. The Commission will permit certified programs to request reimbursement every six months, commencing with the starting date of the pilot program, as determined by CGB. Certified programs may seek reimbursement of costs up to the funding allocation for the state, for the equipment they distribute and related services they provide. In order to be compensated for equipment distributed and services rendered, certified programs must submit documentation and a reasonably detailed explanation of those costs incurred within 30 days after the end of each six-month period of the funding year. Costs submitted must be for those costs actually incurred during the prior six-month period. The TRS Fund Administrator and the NDBEDP Administrator shall review submitted costs and may request supporting documentation to verify the expenses claimed, and may also disallow unreasonable costs.

21. *Rollover and Reallocation.* The Commission will not permit the rollover of unused funds from one Fund year to another, in part because the Commission believes that not having the option of carrying over unused funds to the next year will create greater incentives for NDBEDP certified programs to distribute communications equipment to their residents rapidly and efficiently. The Commission will review NDBEDP funding data as it becomes available, and will consider whether to keep or revise this funding approach for

the permanent NDBEDP. The Commission also delegates authority to the CGB to reduce, raise, or reallocate funding allocations to any certified program as it may deem necessary and appropriate.

22. *Administrative Costs.* For the NDBEDP pilot program, the Commission will allow certified programs to receive reimbursement from the TRS Fund for administrative costs that do not exceed 15 percent of the total reimbursable costs for the distribution of equipment and related services permitted under this program. The Commission expects such administrative costs incurred through participation in the NDBEDP pilot program to typically cover expenses incurred through reporting requirements, accounting, regular audits, oversight, and general administration.

23. *Funding Caps.* Because there is insufficient information in the record to support specific caps or amounts that should be used for outreach, assessments, equipment, installation, or training out of each state's funding allocation, the Commission will not adopt any such caps for the pilot program at this time. The Commission does, however, require that all costs incurred through participation in the NDBEDP pilot program be reasonable and notes that the Commission will carefully monitor and evaluate the data submitted by certified programs for reimbursement of costs, as well as all other data and information submitted in the semi-annual reports filed by certified programs, to determine whether caps on outreach, assessments, equipment, installation, or training costs are necessary and appropriate in subsequent Fund years of the NDBEDP pilot program or for the permanent program.

Oversight and Reporting

24. The Commission adopts a six-month reporting requirement as part of our NDBEDP pilot rules. This reporting requirement is necessary to provide timely data for the effective administration of the NDBEDP pilot; to assess the effectiveness of the pilot program in meeting the communications equipment and technology needs of deaf-blind individuals; to ensure that the TRS Fund is being used for the purpose intended by Congress; to detect and prevent potential fraud, waste and abuse of the TRS Fund; to ensure compliance with our rules; and to inform our rulemaking for the permanent NDBEDP. This reporting schedule also coincides with and complements the schedule for program reimbursements. The information the Commission requires certified programs to report is set out in our rules.

25. The Commission is mindful that qualitative as well as quantitative data may be needed to appropriately assess the efficiency and effectiveness of the certified programs and the pilot program, and to better inform the structure and operation and the development of rules for a permanent NDBEDP. The Commission takes particular note of the need expressed by several commenters for input from deaf-blind consumers, advocacy groups, and leaders. The Commission encourages certified programs to seek and obtain such qualitative data and to share that information with the Commission.

26. In order to receive compensation from the TRS Fund, each certified program must engage an independent auditor to perform an annual audit designed to detect and prevent fraud, waste and abuse. In addition, all such programs must submit, as necessary, to any audits directed by the Commission, CGB, the NDBEDP Administrator, or the TRS Fund Administrator. The Commission also requires all certified programs to retain all records associated with the distribution of equipment and provision of related services under the NDBEDP for two years following the termination of the pilot program. The Commission believes that adopting these policies will promote greater transparency and accountability.

27. To further prevent abuse, the Commission also adopts a rule that prohibits certified programs from accepting any type of financial arrangement from an equipment vendor that could incentivize the purchase of particular equipment. The Commission will request during the initial certification application process and thereafter, as necessary, disclosure of actual or potential conflicts of interest with manufacturers or providers of equipment, software, or applications that may be distributed under the NDBEDP. Finally, the Commission requires that each NDBEDP certified program filing these reports attest to the truth and accuracy of the information provided in these reports under penalty of perjury.

Logistics and Division of Responsibilities

28. The Commission delegates authority to the CGB to take the administrative actions necessary to implement and administer the NDBEDP. CGB will designate an NDBEDP Administrator to review applications and certify programs for participation in the NDBEDP pilot; allocate funding; review submissions for reimbursement of costs; establish and maintain an NDBEDP Web site and oversee other outreach efforts undertaken by the Commission; confer with stakeholders and obtain, review, and analyze data to assess the effectiveness of the pilot program; work with Commission staff on the adoption of rules for a permanent program; and serve as the Commission's point of contact for the NDBEDP.

29. The Commission also concludes that the TRS Fund Administrator, as directed by the NDBEDP Administrator, shall have responsibility for (A) reviewing cost submissions and releasing funds for equipment that has been distributed and authorized related services, including outreach efforts; (B) releasing funds for other authorized purposes, as requested by the Commission or CGB; and (C) collecting data as needed for delivery to the Commission and the NDBEDP Administrator.

Other Considerations

30. *Advisory Body.* The Commission believes that the participation of deaf-blind consumers is critical in all aspects of the NDBEDP to ensure that the program effectively meets the needs of this constituency. The Commission is exploring the best means by which to engage and confer with these and other stakeholders. While the Commission will not create a separate advisory body at this time, the NDBEDP Administrator will nevertheless meet with stakeholders, including consumers who are deaf-blind, consumer groups, experts on deaf-blindness, technical experts, manufacturers, vendors, and certified programs, jointly or separately, during the course of the pilot program to obtain ongoing input and feedback.

31. *Central Repository.* The Commission believes that the best means of ensuring that the public has up-to-date information about the equipment made available by NDBEDP certified programs is to include such information in the clearinghouse on accessible products and services that the Commission will be establishing over the next year under the CVAA. The Commission hopes to gather extensive information about the equipment provided under the NDBEDP for inclusion within this clearinghouse from the reports submitted during this pilot program.

32. *NDBEDP as a Supplemental Funding Source.* When it is established, the NDBEDP will be one of several federal laws or programs that either mandate or authorize the provision of specialized CPE to individuals who are deaf-blind. The Commission concludes that the NDBEDP provides a new

funding resource for the distribution of equipment that supplements, rather than supplants any existing legal mandates or programs for equipment available to consumers today. Individuals who are deaf-blind should not be disqualified from participating in the NDBEDP pilot program because they may also be eligible for or receive equipment under other programs for other purposes (*e.g.,* education or employment related equipment). Instead, individual assessments must be conducted to determine each deaf-blind person's needs for different settings. The Commission encourages NDBEDP certified programs to collaborate with other programs to achieve the goal of addressing the communication technology needs of this underserved population while avoiding duplicative services.

33. *Program Compliance.* In addition to the certification, the Commission requires that each NDBEDP certified program requesting reimbursement for equipment and related services under this program attest to the truth and accuracy of the claims for reimbursement submitted, under penalty of perjury. To ensure that individuals with knowledge of program abuses are encouraged to come forward, the Commission also adopts a whistleblower protection rule for the NDBEDP pilot program. The Commission also reserves the right to suspend or revoke NDBEDP certification if, after notice and opportunity for hearing, it determines that such certification is no longer warranted. In cases where a program's certification has been suspended or revoked, the Commission delegates authority to CGB to take such steps as may be necessary, to ensure continuity of the NDBEDP for that state. The Commission may also, on its own motion, require a certified program to submit documentation demonstrating ongoing compliance with the Commission's rules, if it has reason to suspect that a state program may not be in compliance with its program rules or requirements.

Final Regulatory Flexibility Certification

37. The Regulatory Flexibility Act of 1980, as amended (RFA), requires that a regulatory flexibility analysis be prepared for rulemaking proceedings, unless the agency certifies that "the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities." *See* 5 U.S.C. 603. The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction." 5 U.S.C. 601(6). In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act. A "small business concern" is one that: (1) Is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA). 15 U.S.C. 632.

38. In document FCC 11–56, the Commission proceeds with rules for implementing a NDBEDP pilot program to provide support to programs approved by the Commission for the distribution of specialized CPE to low-income individuals who are deaf-blind. In the Notice of Proposed Rulemaking in this proceeding, document FCC 11–3, the Commission concluded that no Initial Regulatory Flexibility Analysis was required because, even if a substantial number of small entities might be affected by the proposed rules, including those deemed to be small entities under the SBA's standard, all of the providers potentially affected by the proposed rules would be entitled to receive reimbursement for their reasonable costs of participation and compliance. Therefore, the Commission concluded that the rules proposed in document FCC 11–3, if adopted, would not have a significant impact on a substantial number of small entities. Accordingly, and as described below, the Commission provides this certification.

39. In document FCC 11–56, the Commission adopts rules to implement section 105 of the CVAA, signed into law by President Obama on October 8, 2010. The CVAA requires the Commission to take various measures to ensure that people with disabilities have access to emerging communications technologies in the 21st century. Section 105 of the CVAA adds section 719 to the Communications Act (the Act), as amended. Section 719 of the Act directs the Commission to establish rules, within six months of enactment, that define as eligible for relay service support those programs approved by the Commission for the distribution of specialized CPE to low-income individuals who are deaf-blind. The equipment to be distributed is needed to make telecommunications service, Internet access service, and advanced communications, including interexchange services and advanced telecommunications and information services, accessible by individuals who are deaf-blind. For these purposes, section 719 of the Act adopts the definition of "individuals who are deaf-blind" in the Helen Keller National Center (HKNC) Act and authorizes $10 million annually from the Interstate Telecommunications Relay Service (TRS) Fund.

40. Specifically, in document FCC 11–56, the Commission concludes that a two-year pilot program, with an option to extend for one more year, will enable the Commission to appropriately assess the most efficient and effective method of administering the NDBEDP, and lay the groundwork for a more permanent program. The Commission adopts rules to establish the NDBEDP pilot program which will rely on existing state equipment distribution programs (EDPs) and other entities to distribute equipment to deaf-blind individuals. The rules provide selection criteria for NDBEDP pilot program application and certification, and for the Commission to certify one program per state as eligible for support. The Commission also adopts eligibility and verification of requirements for individuals to qualify as "low-income" and "deaf-blind" for receipt of equipment and services from NDBEDP certified programs.

41. Document FCC 11–56 makes the full amount of authorized funding, $10 million, available to the NDBEDP pilot program during each TRS Fund year, of which up to $500,000 per year may be used to support certified programs through national outreach efforts. Initial funding allocations will provide a base amount of $50,000 for each state, with the balance of available funds allocated in proportion to the population of each state. Document FCC 11–56 gives NDBEDP certified programs the discretion to determine the equipment to be provided, whether specialized or off-the-shelf, separately or in combination, provided that the equipment meets the needs of the individual and makes the communications services covered under section 719 of the Act accessible. The rules require certified programs to submit requests for and to be reimbursed every six months, up to each state's allotment, for the equipment distributed and the reasonable costs of warranties, maintenance, repairs, temporary equipment loans, and refurbishing; and for the reasonable costs of conducting state and local outreach and individualized needs assessments, installing equipment, and providing individualized training on how to use the equipment. The rules adopt a funding cap for administrative costs at 15 percent of the total reimbursable costs for the distribution of equipment and provision of authorized related services. Funds that are not used in one TRS Fund year will

not be carried over to the next TRS Fund year.

42. Document FCC 11–56 adopts a six-month reporting requirement for certified programs, specifying the information to be reported and certification under penalty of perjury by a senior executive of the certified program. In addition, document FCC 11–56 requires certified programs to conduct annual independent audits, retain records, and disclose potential conflicts of interest. Document FCC 11–56 also adopts rules for the designation of and actions to be taken by an NDBEDP Administrator, and the actions to be taken by the TRS Fund Administrator related to the administration and operation of the NDBEDP.

43. With regard to whether the rules adopted by document FCC 11–56 will have a *significant economic impact* on a substantial number of small entities, NDBEDP certified programs affected by these rules are entitled to receive reimbursement, as described above, up to each state's allotment, for the equipment distributed, related services provided, and administrative costs of participation in the NDBEDP. As such, the economic impact on such entities will be *de minimis.* Therefore, the Commission concludes that the rules adopted by document FCC 11–56 will not have a significant economic impact on these entities.

44. With regard to whether a *substantial number* of small entities may be economically impacted by the rules adopted by document FCC 11–56, the Commission notes that existing state EDPs and other entities certified by the Commission to participate in the NDBEDP pilot program to distribute equipment to low-income individuals who are deaf-blind are likely to meet the definition of a small entity as a "small business," "small organization," or a "small governmental jurisdiction." The Commission describes here, at the outset, three comprehensive, statutory small entity size standards. First, nationwide, there are a total of approximately 27.2 million small businesses, according to the SBA. In addition, a "small organization" is generally "any not-for-profit enterprise which is independently owned and operated and is not dominant in its field." Nationwide, as of 2002, there were approximately 1.6 million small organizations. Finally, the term "small governmental jurisdiction" is defined generally as "governments of cities, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand." Census Bureau data for 2002 indicate that there were 87,525 local governmental jurisdictions in the United States. The Commission estimates that, of this total, 84,377 entities were "small governmental jurisdictions." Thus, the Commission estimates that most governmental jurisdictions are small.

45. While the Congressional mandate has led us to list the above entities as the ones that in all reasonable likelihood will function as NDBEDP certified programs, there exists the possibility that our list may not be complete and/or may subsequently include entities not listed above. This includes entities which may not fit into traditional categories currently under the Commission's jurisdiction. However, as noted above, the Commission will rely on existing state EDPs and other entities to distribute equipment to low-income individuals who are deaf-blind. The rules provide selection criteria for NDBEDP pilot program application and certification, and for the Commission to certify one program per state as eligible for support. Therefore, *a maximum of 53 entities* may be selected to participate in the NDBEDP pilot program—the 50 states plus the District of Columbia, Puerto Rico, and the Virgin Islands. Each of these jurisdictions currently administers an intrastate TRS program. The Commission concludes, therefore, that a substantial number of small entities will not be affected by the rules adopted document FCC 11–56.

46. Therefore, the Commission certifies that the requirements of document FCC 11–56 will not have a significant economic impact on a substantial number of small entities.

47. The Commission will send a copy of document FCC 11–56, including a copy of this Final Regulatory Flexibility Certification, in a report to Congress and the Government Accountability Office pursuant to the Congressional Review Act. In addition, document FCC 11–56 and this final certification will be sent to the Chief Counsel for Advocacy of the SBA.

Ordering Clauses

48. Pursuant to the authority contained in sections 1, 4(i), 4(j), and 719 of the Communications Act of 1934, as amended, 47 U.S.C. 151, 154(i), 154(j), and 620, document FCC 11–56 *is adopted.*

Document FCC 11–56 shall become effective June 8, 2011 except that rules that contain information collection requirements, which are subject to the PRA and require approval by OMB, shall become effective after the Commission publishes a notice in the **Federal Register** announcing such approval and the relevant effective date.

49. The Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, *shall send* a copy of document FCC 11–56, including the Final Regulatory Flexibility Certification, to the Chief Counsel for Advocacy of the Small Business Administration.

List of Subjects in 47 CFR 64

Reporting and recordkeeping requirements, Telecommunications, Telephone.

Federal Communications Commission.

Bulah P. Wheeler,

Deputy Manager.

For the reasons discussed in the preamble, the Federal Communications Commission amends 47 CFR part 64 as follows:

PART 64—MISCELLANEOUS RULES RELATING TO COMMON CARRIERS

■ 1. The authority citation for part 64 is revised to read as follows:

Authority: 47 U.S.C. 154, 254(k); secs. 403(b)(2)(B), (c), Pub. L. 104–104, 110 Stat. 56. Interpret or apply 47 U.S.C. 201, 218, 225, 226, 228, 254(k), and 620, unless otherwise noted.

Subpart F—Telecommunications Relay Services and Related Customer Premises Equipment for Persons With Disabilities

■ 2. The authority citation for Subpart F is revised to read as follows:

Authority: 47 U.S.C. 151–154; 225, 255, 303(r), and 620.

■ 3. Section 64.610 is added to read as follows:

§ 64.610 Establishment of a National Deaf-Blind Equipment Distribution Program.

(a) The National Deaf-Blind Equipment Distribution Program (NDBEDP) is established as a pilot program to distribute specialized customer premises equipment (CPE) used for telecommunications service, Internet access service, and advanced communications, including interexchange services and advanced telecommunications and information services, to low-income individuals who are deaf-blind. The duration of this pilot program will be two years, with a Commission option to extend such program for an additional year.

(b) *Certification to receive funding.* For each state, the Commission will certify a single program as the sole authorized entity to participate in the NDBEDP and receive reimbursement for

its program's activities from the Interstate Telecommunications Relay Service Fund (TRS Fund). Such entity will have full oversight and responsibility for distributing equipment and providing related services in that state, either directly or through collaboration, partnership, or contract with other individuals or entities in-state or out-of-state, including other NDBEDP certified programs.

(1) Any state with an equipment distribution program (EDP) may have its EDP apply to the Commission for certification as the sole authorized entity for the state to participate in the NDBEDP and receive reimbursement for its activities from the TRS Fund.

(2) Other public programs, including, but not limited to, vocational rehabilitation programs, assistive technology programs, or schools for the deaf, blind or deaf-blind; or private entities, including but not limited to, organizational affiliates, independent living centers, or private educational facilities, may apply to the Commission for certification as the sole authorized entity for the state to participate in the NDBEDP and receive reimbursement for its activities from the TRS Fund.

(3) The Commission shall review applications and determine whether to grant certification based on the ability of a program to meet the following qualifications, either directly or in coordination with other programs or entities, as evidenced in the application and any supplemental materials, including letters of recommendation:

(i) Expertise in the field of deaf-blindness, including familiarity with the culture and etiquette of people who are deaf-blind, to ensure that equipment distribution and the provision of related services occurs in a manner that is relevant and useful to consumers who are deaf-blind;

(ii) The ability to communicate effectively with people who are deaf-blind (for training and other purposes), by among other things, using sign language, providing materials in Braille, ensuring that information made available online is accessible, and using other assistive technologies and methods to achieve effective communication;

(iii) Staffing and facilities sufficient to administer the program, including the ability to distribute equipment and provide related services to eligible individuals throughout the state, including those in remote areas;

(iv) Experience with the distribution of specialized CPE, especially to people who are deaf-blind;

(v) Experience in how to train users on how to use the equipment and how to set up the equipment for its effective use; and

(vi) Familiarity with the telecommunications, Internet access, and advanced communications services that will be used with the distributed equipment.

(c) *Definitions.* For purposes of this section, the following definitions shall apply:

(1) *Equipment.* Hardware, software, and applications, whether separate or in combination, mainstream or specialized, needed by an individual who is deaf-blind to achieve access to telecommunications service, Internet access service, and advanced communications, including interexchange services and advanced telecommunications and information services, as these services have been defined by the Communications Act.

(2) *Individual who is deaf-blind.* (i) Any person:

(A) Who has a central visual acuity of 20/200 or less in the better eye with corrective lenses, or a field defect such that the peripheral diameter of visual field subtends an angular distance no greater than 20 degrees, or a progressive visual loss having a prognosis leading to one or both these conditions;

(B) Who has a chronic hearing impairment so severe that most speech cannot be understood with optimum amplification, or a progressive hearing loss having a prognosis leading to this condition; and

(C) For whom the combination of impairments described in clauses (c)(2)(i)(A) and (B) of this section cause extreme difficulty in attaining independence in daily life activities, achieving psychosocial adjustment, or obtaining a vocation.

(ii) The definition in this paragraph also includes any individual who, despite the inability to be measured accurately for hearing and vision loss due to cognitive or behavioral constraints, or both, can be determined through functional and performance assessment to have severe hearing and visual disabilities that cause extreme difficulty in attaining independence in daily life activities, achieving psychosocial adjustment, or obtaining vocational objectives. An applicant's functional abilities with respect to using telecommunications, Internet access, and advanced communications services in various environments shall be considered when determining whether the individual is deaf-blind under clauses (c)(2)(ii)(A) and (C) of this section.

(d) *Eligibility criteria.* (1) *Verification of disability.* Individuals claiming eligibility under the NDBEDP must provide verification of disability from a professional with direct knowledge of the individual's disability.

(i) Such professionals may include, but are not limited to, community-based service providers, vision or hearing related professionals, vocational rehabilitation counselors, educators, audiologists, speech pathologists, hearing instrument specialists, and medical or health professionals.

(ii) Such professionals must attest, either to the best of their knowledge or under penalty of perjury, that the applicant is an individual who is deaf-blind (as defined in 47 CFR 64.610(b)). Such professionals may also include, in the attestation, information about the individual's functional abilities to use telecommunications, Internet access, and advanced communications services in various settings.

(iii) Existing documentation that a person is deaf-blind, such as an individualized education program (IEP) or a statement from a public or private agency, such as a Social Security determination letter, may serve as verification of disability.

(iv) The verification of disability must include the attesting professional's name, title, and contact information, including address, phone number, and e-mail address.

(2) *Verification of low income status.* An individual claiming eligibility under the NDBEDP must provide verification that he or she has an income that does not exceed 400 percent of the Federal Poverty Guidelines as defined at 42 U.S.C. 9902(2) or that he or she is enrolled in a federal program with a lesser income eligibility requirement, such as the Federal Public Housing Assistance or Section 8; Supplemental Nutrition Assistance Program, formerly known as Food Stamps; Low Income Home Energy Assistance Program; Medicaid; National School Lunch Program's free lunch program; Supplemental Security Income; or Temporary Assistance for Needy Families. The NDBEDP Administrator may identify state or other federal programs with income eligibility thresholds that do not exceed 400 percent of the Federal Poverty Guidelines for determining income eligibility for participation in the NDBEDP. Where an applicant is not already enrolled in a qualifying low-income program, low-income eligibility may be verified by the certified program using appropriate and reasonable means.

(3) *Prohibition against requiring employment.* No program certified under the NDBEDP may impose a requirement for eligibility in this program that an applicant be employed or actively seeking employment.

(4) *Access to communications services.* A program certified under the NDBEDP may impose, as a program eligibility criterion, a requirement that telecommunications, Internet access, or advanced communications services are available for use by the applicant.

(e) *Equipment distribution and related services.* (1) Each program certified under the NDBEDP must:

(i) Distribute specialized CPE and provide related services needed to make telecommunications service, Internet access service, and advanced communications, including interexchange services or advanced telecommunications and information services, accessible to individuals who are deaf-blind;

(ii) Obtain verification that NDBEDP applicants meet the definition of an individual who is deaf-blind contained in 47 CFR 64.610(c)(1) and the income eligibility requirements contained in 47 CFR 64.610(d)(2);

(iii) When a recipient relocates to another state, permit transfer of the recipient's account and any control of the distributed equipment to the new state's certified program; (iv) Permit transfer of equipment from a prior state, by that state's NDBEDP certified program;

(v) Prohibit recipients from transferring equipment received under the NDBEDP to another person through sale or otherwise;

(vi) Conduct outreach, in accessible formats, to inform their state residents about the NDBEDP, which may include the development and maintenance of a program Web site;

(vii) Engage an independent auditor to perform annual audits designed to detect and prevent fraud, waste, and abuse, and submit, as necessary, to audits arranged by the Commission, the Consumer and Governmental Affairs Bureau, the NDBEDP Administrator, or the TRS Fund Administrator for such purpose;

(viii) Retain all records associated with the distribution of equipment and provision of related services under the NDBEDP for two years following the termination of the pilot program; and

(ix) Comply with the reporting requirements contained in 47 CFR 64.610(g).

(2) Each program certified under the NDBEDP may not:

(i) Impose restrictions on specific brands, models or types of communications technology that recipients may receive to access the communications services covered in this section;

(ii) Disable or otherwise intentionally make it difficult for recipients to use certain capabilities, functions, or features on distributed equipment that are needed to access the communications services covered in this section, or direct manufacturers or vendors of specialized CPE to disable or make it difficult for recipients to use certain capabilities, functions, or features on distributed equipment that are needed to access the communications services covered in this section; or

(iii) Accept any type of financial arrangement from equipment vendors that could incentivize the purchase of particular equipment.

(f) *Payments to NDBEDP certified programs.* (1) Programs certified under the NDBEDP shall be reimbursed for the cost of equipment that has been distributed to eligible individuals and authorized related services, up to the state's funding allotment under this program as determined by the Commission or any entity authorized to act for the Commission on delegated authority.

(2) Within 30 days after the end of each six-month period of the Fund Year, each program certified under the NDBEDP pilot must submit documentation that supports its claim for reimbursement of the reasonable costs of the following:

(i) Equipment and related expenses, including maintenance, repairs, warranties, returns, refurbishing, upgrading, and replacing equipment distributed to consumers;

(ii) Individual needs assessments;

(iii) Installation of equipment and individualized consumer training;

(iv) Maintenance of an inventory of equipment that can be loaned to the consumer during periods of equipment repair;

(v) Outreach efforts to inform state residents about the NDBEDP; and

(vi) Administration of the program, but not to exceed 15 percent of the total reimbursable costs for the distribution of equipment and related services permitted under the NDBEDP.

(3) With each request for payment, the chief executive officer, chief financial officer, or other senior executive of the certified program, such as a manager or director, with first-hand knowledge of the accuracy and completeness of the claim in the request, must certify as follows:

I swear under penalty of perjury that I am (name and title), an officer of the above-named reporting entity and that I have examined all cost data associated with equipment and related services for the claims submitted herein, and that all such data are true and an accurate statement of the affairs of the above-named certified program.

(g) *Reporting requirements.* (1) Each program certified under the NDBEDP must submit the following data electronically to the Commission, as instructed by the NDBEDP Administrator, every six months, commencing with the start of the pilot program:

(i) For each piece of equipment distributed, the identity of and contact information, including street and e-mail addresses, and phone number, for the individual receiving that equipment;

(ii) For each piece of equipment distributed, the identity of and contact information, including street and e-mail addresses, and phone number, for the individual attesting to the disability of the individual who is deaf-blind;

(iii) For each piece of equipment distributed, its name, serial number, brand, function, and cost, the type of communications service with which it is used, and the type of relay service it can access;

(iv) For each piece of equipment distributed, the amount of time, following any assessment conducted, that the requesting individual waited to receive that equipment;

(v) The cost, time and any other resources allocated to assessing an individual's equipment needs;

(vi) The cost, time and any other resources allocated to installing equipment and training deaf-blind individuals on using equipment;

(vii) The cost, time and any other resources allocated to maintain, repair, cover under warranty, and refurbish equipment;

(viii) The cost, time and any other resources allocated to outreach activities related to the NDBEDP, and the type of outreach efforts undertaken;

(ix) The cost, time and any other resources allocated to upgrading the distributed equipment, along with the nature of such upgrades;

(x) To the extent that the program has denied equipment requests made by their deaf-blind residents, a summary of the number and types of equipment requests denied and reasons for such denials;

(xi) To the extent that the program has received complaints related to the program, a summary of the number and types of such complaints and their resolution; and

(xii) The number of qualified applicants on waiting lists to receive equipment.

(2) With each report, the chief executive officer, chief financial officer, or other senior executive of the certified program, such as a director or manager, with first-hand knowledge of the accuracy and completeness of the information provided in the report, must certify as follows:

I swear under penalty of perjury that I am (name and title), an officer of the above-named reporting entity and that I have examined the foregoing reports and that all requested information has been provided and all statements of fact are true and an accurate statement of the affairs of the above-named certified program.

(h) *Administration of the program.* The Consumer and Governmental Affairs Bureau shall designate a Commission official as the NDBEDP Administrator.

(1) The NDBEDP Administrator will work in collaboration with the TRS Fund Administrator, and be responsible for:

(i) Reviewing program applications received from state EDPs and alternate entities and certifying those that qualify to participate in the program;

(ii) Allocating NDBEDP funding as appropriate and in consultation with the TRS Fund Administrator;

(iii) Reviewing certified program submissions for reimbursement of costs under the NDBEDP, in consultation with the TRS Fund Administrator;

(iv) Working with Commission staff to establish and maintain an NDBEDP Web site, accessible to individuals with disabilities, that includes contact information for certified programs by state and links to their respective Web sites, if any, and overseeing other outreach efforts that may be undertaken by the Commission;

(v) Obtaining, reviewing, and evaluating reported data for the purpose of assessing the pilot program and determining best practices;

(vi) Conferring with stakeholders, jointly or separately, during the course of the pilot program to obtain input and feedback on, among other things, the effectiveness of the pilot program, new technologies, equipment and services that are needed, and suggestions for the permanent program;

(vii) Working with Commission staff to adopt permanent rules for the NDBEDP; and

(viii) Serving as the Commission point of contact for the NDBEDP, including responding to inquiries from certified programs and consumer complaints filed directly with the Commission.

(2) The TRS Fund Administrator, as directed by the NDBEDP Administrator, shall have responsibility for:

(i) Reviewing cost submissions and releasing funds for equipment that has been distributed and authorized related services, including outreach efforts;

(ii) Releasing funds for other authorized purposes, as requested by the Commission or the Consumer and Governmental Affairs Bureau; and

(iii) Collecting data as needed for delivery to the Commission and the NDBEDP Administrator.

(i) *Whistleblower protections.* (1) NDBEDP certified programs shall permit, without reprisal in the form of an adverse personnel action, purchase or contract cancellation or discontinuance, eligibility disqualification, or otherwise, any current or former employee, agent, contractor, manufacturer, vendor, applicant, or recipient, to disclose to a designated official of the certified program, the NDBEDP Administrator, the TRS Fund Administrator, the Commission's Office of Inspector General, or to any federal or state law enforcement entity, any known or suspected violations of the Act or Commission rules, or any other activity that the reporting person reasonably believes to be unlawful, wasteful, fraudulent, or abusive, or that otherwise could result in the improper distribution of equipment, provision of services, or billing to the TRS Fund.

(2) NDBEDP certified programs shall include these whistleblower protections with the information they provide about the program in any employee handbooks or manuals, on their Web sites, and in other appropriate publications.

(j) *Suspension or revocation of certification.* (1) The Commission may suspend or revoke NDBEDP certification if, after notice and opportunity for hearing, the Commission determines that such certification is no longer warranted.

(2) In the event of suspension or revocation, the Commission shall take such steps as may be necessary, consistent with this subpart, to ensure continuity of the NDBEDP for the state whose program has been suspended or revoked.

(3) The Commission may, at its discretion and on its own motion, require a certified program to submit documentation demonstrating ongoing compliance with the Commission's rules if, for example, the Commission receives evidence that a state program may not be in compliance with those rules.

(k) *Expiration of rules.* These rules will expire at the termination of the NDBEDP pilot program.

[FR Doc. 2011–10228 Filed 5–6–11; 8:45 am]

BILLING CODE 6712–01–P

Proposed Rules

Federal Register
Vol. 76, No. 89
Monday, May 9, 2011

This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

DEPARTMENT OF STATE

2 CFR Chapter VI

22 CFR Chapter I

28 CFR Chapter XI

48 CFR Chapter 6

[Public Notice: 7447]

Reducing Regulatory Burden; Retrospective Review Under E.O. 13563

AGENCY: United States Department of State.

ACTION: Request for information.

SUMMARY: In accordance with Executive Order 13563 and guidance from the Office of Management and Budget (OMB), the Department of State ("the Department") has submitted its preliminary plan to the OMB, and is simultaneously providing it to the public for review.

DATES: Comments on the Department's preliminary plan will be accepted until June 30, 2011.

ADDRESSES: Interested parties may submit comments within 60 days of the publication of this notice. To submit comments:

- By e-mail to *RegulatoryReview@state.gov,* with the subject line: "Response to the Plan"
- Through the Federal regulatory portal at Regulations.gov; search for Docket Number DOS–2011–0079.

SUPPLEMENTARY INFORMATION: The Department's "Preliminary Plan for Retrospective Analysis of Existing Rules," dated April 25, 2011, follows:

I. Executive Summary of Preliminary Plan and Compliance With Executive Order 13563

Executive Order 13563 recognizes the importance of maintaining a consistent culture of retrospective review and analysis throughout the executive branch. Before a rule has been tested, it is difficult to be certain of its consequences, including its costs and benefits. The Department of State's plan is designed to create a defined mechanism for identifying certain significant rules that are obsolete, unnecessary, unjustified, excessively burdensome, or counterproductive. Its review processes are also intended to facilitate the strengthening, complementing, or modernizing rules where necessary or appropriate.

II. Scope of Plan

a. There are no sub-agencies within the Department of State for including in this plan.

b. Check all the types of documents covered under this plan:

_*X*_Existing regulations
_*X*_Significant guidance documents
_*X*_Existing information collections
_*X*_ Unfinished proposed rules
____ Other (Specify_____)

III. Public Access and Participation

a. The Department of State is responsible for carrying out the nation's foreign policy and representing the United States abroad. It is essential that we take every opportunity to engage the public as we do this vital work on their behalf. Our era is one in which news from around the world is accessible to everyone on a moment-by-moment basis. Reflecting this new era, the Department has invested heavily in the use of social media tools, such as Facebook®, Twitter®, blogs, and wikis for internal collaboration and external engagement. We must continually be prepared to engage the public in our work, which is why the Department's Web site presents up-to-date information on the issues of the day in foreign affairs and development assistance. Our Open Government Web site (*http://www.state.gov/open*) provides a central location where one can follow the Department's efforts on key initiatives including the release of datasets at *http://www.data.gov.* In addition, the latest information on our Preliminary Plan, along with links to various government and other sites, is hosted at *http://www.state.gov/.*

The Department of State published a notice in the **Federal Register** on March 15, 2011 seeking public comment on developing our Preliminary Plan. You may find the notice located at *http://www.state.gov,* in the About State tab, Rules and Information Collection link.

b. Brief summary of public comments to notice seeking input:

We received two comments from the public in response to our initial **Federal Register** notice.

IV. Current Agency Efforts Already Underway Independent of E.O. 13563

a. Summary of Pre-Existing Agency Efforts (Independent of E.O. 13563) Already Underway To Conduct Retrospective Analysis of Existing Rules

The Department is responsible for implementing the President's foreign policy. The fundamental activities of diplomacy are based on generation of trust, and the establishment of common dialogue. Most of these activities involve nuance of language in creating a shared understanding. Today, offices in the Department focus on a wide spectrum of issues, including counterterrorism, nuclear arms proliferation, climate change, human rights, institution building, and international trade and finance. The complexity of these issues requires extensive collaboration with other U.S. Government agencies at overseas posts and in Washington, as well as with foreign governments, non-governmental organizations, and other partners.

The Department recognizes that a key part of its mission is to engage the American public on the nation's foreign policy. The explosive growth in the Internet and social media tools has enabled greater citizen participation than was possible. As a result, the Department receives ongoing feedback on our regulations, Foreign Affairs Manual, public notices and information collections from the public at-large, DHS and other government agencies and other interested stakeholders. Our Exchange Visitor Program holds public meetings with private sector, academic and governmental program sponsors for providing oversight and compliance feedback.

b. What specific rules, if any, were already under consideration for retrospective analysis?

See the latest publication of the Department's submission to the Unified Agenda of Federal Regulatory and Deregulatory Actions by going to Reginfo.gov at *http://www.reginfo.gov/public/do/eAgendaMain.* In addition, see Section V(c) below, for rules in the Bureau of Political-Military Affairs that

were already under consideration for retrospective analysis. Revisions to the U.S. Munitions List were already in progress.

V. Elements of Preliminary Plan/ Compliance With E.O. 13563

a. How does the agency plan to develop a strong, ongoing culture of retrospective analysis?

The Department's leadership, beginning with Secretary Clinton, is looking forward to the opportunities presented in the E.O. initiative. We all recognize the importance of collaboration, engagement, partnerships, and accountability. The principal focus of this plan is to build on the work currently underway and expand our engagement with all of our stakeholders. We have created a Rules and Information Collection Web site, linked to the Department's home page. The Web site provides access to available information and represents an effort to engage the public more dynamically, solicit input, and increase collaboration for an on-going retrospective analysis. The URL for the site is: *http://www.state.gov/m/a/dir/rulemaking/index.htm.*

State's mission also includes making international information available to the public. The Bureau of Consular Affairs provides detailed travel information for all countries via the Internet on *http://www.travel.state.gov.* The first quantitative assessment of online open government efforts recently found this site to be one of the highest ranking in online transparency. State.gov also scored high in this transparency project, which surveyed more than 36,000 citizens who visited 14 Federal sites during the fourth quarter of 2009.

Through our Web site, we will encourage the public to review and to provide us with their comments on the best way to conduct our analysis on an ongoing basis. We will also actively seek views from the public on specific rules or Department-imposed obligations that might be modified or repealed. Within the Department an executive committee was created with responsibility for developing a preliminary plan and for subsequent periodic reviews. All offices responsible for writing rules were requested to nominate a representative who will be an active and responsible regulatory review member. Although our regulatory procedures are dynamic and have constant triggers that promote review and amendment to our rules and other guidance, we will conduct annual reviews, with the first one commencing on the anniversary after the completion of the initial review. In addition, each proposed rule and final rule will be reviewed for meeting the requirements of the E.O.

b. Prioritization. What factors and processes will the agency use in setting priorities?

The Department of State is the agency with lead responsibility for formulating and carrying out the nation's foreign policy. The Department operates in Washington, DC and in nearly 200 countries, with over 285 locations world-wide. State's major program areas include diplomacy, border security, U.S. citizen's services, and foreign assistance. The Department's Mission Statement is to *Advance freedom for the benefit of the American people and the international community by helping to build and sustain a more democratic, secure, and prosperous world composed of well-governed states that respond to the needs of their people, reduce widespread poverty, and act responsibly within the international system.* The Department, being the diplomatic arm of the U.S. government, generates many narrative documents, treaties, and inter-governmental agreements.

The fundamental activities of diplomacy are based on human contact and the establishment of common dialogue to both further ties, as well as resolve conflict in a peaceful manner between nations. This function is not the subject of rulemaking; for this reason, the Department does not publish many rules on a year-to-year basis.

c. Initial List of Candidate Rules for Review Over the Next Two Years

- In the Bureau of Political-Military Affairs

PM/DDTC—Regulations Under Review

(1) Revision of United States Munitions List, International Traffic in Arms Regulations (ITAR) part 121

Each category will be the subject of a separate rule.

- Category I—Firearms, Close Assault Weapons and Combat Shotguns
- Category II—Guns and Armament
- Category III—Ammunition/ Ordnance
- Category IV—Launch Vehicles, Guided Missiles, Ballistic Missiles, Rockets, Torpedoes, Bombs and Mines
- Category V—Explosives and Energetic Materials, Propellants, Incendiary Agents and Their Constituents
- Category VI—Vessels of War and Special Naval Equipment.
- Category VII—Tanks and Military Vehicles
- Category VIII—Aircraft and Associated Equipment
- Category IX—Military Training Equipment and Training
- Category X—Protective Personnel Equipment and Shelters
- Category XI—Military Electronics
- Category XII—Fire Control, Range Finder, Optical and Guidance and Control Equipment
- Category XIII—Auxiliary Military Equipment
- Category XIV—Toxicological Agents, Including Chemical Agents, Biological Agents, and Associated Equipment
- Category XV—Spacecraft Systems and Associated Equipment
- Category XVI—Nuclear Weapons, Design and Testing Related Items
- Category XVII—Classified Articles, Technical Data and Defense Services Not Otherwise Enumerated
- Category XVIII—Directed Energy Weapons
- Category XIX—Gas Turbine Engines
- Category XX—Submersible Vessels, Oceanographic and Associated Equipment

(2) New licensing exemption for certain replacement parts and incorporated articles (ITAR sections 123.28 and 126.19).

(3) New licensing exemption for transfer of defense articles to dual national and third-country national employees (ITAR section 126.18).

(4) New licensing exemption for the temporary export for personal use of chemical agent protective gear (ITAR section 123.17).

(5) New electronic submission of registration payments (ITAR parts 120, 122, and 129).

(6) Clarification of records maintenance requirement (ITAR section 122.5)

(7) Discontinue submissions of form DSP–53 (ITAR section 123.4).

(8) Change in requirements for the return of licenses (ITAR section 123.22).

(9) Revision of agreements procedures (ITAR part 124).

(10) Update information on sanctioned countries (ITAR section 126.1).

(11) Clarify and reflect new policy for exports made by or for the U.S. Government (ITAR section 126.4).

(12) Revise brokering regulations (ITAR part 129).

(13) Revise definition of "defense service" (ITAR sections 120.9, 120.38, 124.1, and 124.2).

(14) New regulations implementing the Australia and UK defense cooperation treaties (ITAR parts 120, 123, 124, 126, 127, and 129).

(15) Establishment of a general program license, which would allow multiple exporters to collaborate with

foreign partners on U.S. government programs (ITAR part 123).

(16) Revise/establish definitions of/for "technology," "specially designed," and "public domain" (ITAR part 120).

(17) Revision of Missile Technology Control Regime annex (ITAR part 121).

• In the Bureau of Resource Management

Repeal part 8 of 22 CFR, Federal Advisory Committee Act (FACA) regulation for the Department of State.

Part 8 is 35 years old and out of date. Since it was initially published, GSA published its FACA regulation in 41 CFR part 102–3. There is no reason for the Department to have a separate regulation in the CFR. The Department will repeal its regulation and publish a Foreign Affairs Manual provision that identifies which offices have responsibility for certain FACA functions, and any internal procedures to be used.

○ In the Bureau of Consular Affairs

Certain provisions will be reviewed pursuant to a request from the American Immigration Lawyers Association. The quotes that follow reflect comments from that organization:

○ Part 41 of 22 CFR: Section 111(b), Issuance of Nonimmigrant Visas in the United States

"As of July 16, 2004, DOS ceased visa reissuance (visa revalidation) for the C, E, H, I, L, O, and P nonimmigrant visa (NIV) categories due to the requirement of biometrics capture for these categories as a result of the Enhanced Border Security and Visa Entry Reform Act (Pub. L. No. 107–173). *See* 69 Fed. Reg. 35121 (June 23, 2004). Visa revalidation greatly enhanced and facilitated international business travel and should be reinstated for the above-referenced visa categories. Biometrics for visa revalidations could be captured by USCIS Application Support Centers."

○ Part 41 of 22 CFR: Section 111(d), Automatic Extension of Validity at Ports of Entry.

"This provision permits a nonimmigrant with an unexpired I–94 Arrival/Departure Record, who is returning to the United States from a contiguous territory after an absence of not more than 30 days, to be readmitted notwithstanding the fact that the underlying nonimmigrant visa has expired, unless the individual has applied for (and presumably been denied) a nonimmigrant visa while abroad. This provision should be amended to permit such individuals to reenter the United States for the period of admission remaining on his or her I–94 card."

○ Part 41 of 22 CFR: Section 81, Fiancé(e) or Spouse of a U.S. Citizen and Derivative Children.

"DOS announced that effective February 1, 2010, it would no longer allow a K–3 applicant to choose whether to proceed with K–3 processing at an NIV consulate or the I–130/immigrant visa (IV) processing at an IV consulate where the National Visa Center (NVC) has received approval notices for both the K–3 and the I–130 petitions. Given the difference in processing times for K–3 NIVs versus IVs at certain consular posts, and the resulting delay in family reunification caused by this recent change, this regulation should be amended to permit the applicant to choose between proceeding with the K–3 or IV application under these circumstances."

○ Part 41 of 22 CFR: Section 103(b)(3), Filing an Electronic NIV Application—Electronic Signature.

"On April 29, 2008, DOS amended the regulations relating to NIVapplications to offer an electronic application procedure on Form DS–160. *See* 73 Fed. Reg. 23067. The supplementary information to the final rule states that while a third party may assist the applicant in preparing the DS–160, the applicant must electronically sign the application him- or herself. This requires the applicant to physically click the "submit" button and does not permit an authorized attorney or representative to do so on the applicant's behalf. This is extremely burdensome for applicants who may not have a computer, access to a computer, or cannot sufficiently complete the electronic form. This provision should be amended to permit a third party to sign the electronic DS–160 with the express consent of the applicant."

○ Part 41 of 22 CFR: Section 105(a), NIV Supporting Documents, and § 41.121(b): Refusal Procedure.

"22 CFR § 41.105(a) states that "[a]ll documents and other evidence presented by the alien, including briefs submitted by attorneys and other representatives, shall be considered by the consular officer." Though 22 CFR § 41.121(b) requires a consular officer to "inform the alien of the ground(s) of ineligibility" when a visa is refused, the information provided in the denial letter is often of a very general nature. The regulations should be amended to require consular officers to provide a detailed statement of ineligibility to demonstrate that all submitted documents were reviewed and considered in accordance with § 41.105(a)."

○ Part 42 of 22 CFR: Section 65, IV Supporting Documents.

"Immigrant visa applicants are required to submit originals of essential documents such as birth certificates, marriage certificates, and police certificates to the NVC. The physical case file, including the original documents, is forwarded to the consulate, but documents can get lost in the file transfer process. This practice should be amended to permit IV applicants to submit good, clear copies of original documents to the NVC and to permit the applicant to bring original documents to the interview for inspection by the consular officer.

○ Part 42 of 22 CFR: Section 21(b), Immigrant Visas for Surviving Beneficiaries/Spouses of Deceased U.S. Citizens.

"USCIS regulations promulgated in 2006, 8 CFR § 204.2(i)(1)(iv), allow for the automatic conversion of an I–130 petition to an I–360 petition upon the petitioner's death in the case of a spouse (widow) of a U.S. citizen. Section 568(c) of the FY2010 Appropriations Act, Pub. L. No. 111–83, included provisions permitting widows married less than two years to similarly self-petition, as well as provisions for benefits for other surviving relatives. Under INA § 204(l), such individuals are eligible for survivor benefits if they can show a U.S. residence at the time of the petitioner's death, even where they have proceeded abroad for the sole purpose of consular processing. However, it appears that DOS has yet to issue guidance or regulations on the treatment of surviving beneficiaries, and may in fact be treating widow petitions as automatically revoked under 8 CFR § 205.1(a)(3), in cases where the petitioner dies before the beneficiary has immigrated to the United States. We ask that regulations and/or guidance be implemented in this regard."

○ A proposal for the right to counsel at U.S. Embassies and consulates.

d. Structure and Staffing. High-Level Agency Official Responsible for Retrospective Review

Name/Position Title: Patrick F. Kennedy, Under Secretary for Management.

E-mail address: RegulatoryReview@state.gov.

e. How does the agency plan to ensure that agency's retrospective team and process maintains sufficient independence from the offices responsible for writing and implementing regulations?

The Department recognizes the importance of independence from the offices responsible for writing and implementing regulations. The Under

Secretary for Management is the lead Department of State official for overall operational implementation of the Executive Order. The retrospective team answers to that official, not to the rule writers. With respect to prospective rules, proposed drafts of such rules must be cleared by the Office of the Legal Adviser, the Bureau of Resource Management, and other offices relevant to the regulation's subject matter, which are typically independent of the rule writers. For example, rules affecting visa policy and procedures require clearance by the Department of Homeland Security (DHS) while various additional circumstances may require clearance by the Office of the Inspector General (OIG) and the Office of Management and Budget (OMB). These required clearance steps ensure objective channels of review for rule drafts.

f. Describe Agency Actions, If Any, To Strengthen Internal Review Expertise. This Could Include Training Staff, Regrouping Staff, Hiring New Staff, or Other Methods

A working group was created to enforce the Department's efforts for making the most up-to-date information available online for the public and Department staff, for discussing information about the requirements of the E.O. and for planning the initial and on-going annual reviews. Looking forward, the Department's bureaus will participate in the rule writing process by contributing staff to the retrospective team. This approach will provide a rich retrospective review exchange with the public and will ensure that all aspects of the Department's broad expertise are reflected in the E.O.'s retrospective analysis of existing rules efforts.

g. How will the agency plan for retrospective analysis over the next two years, and beyond?

This plan has been developed collaboratively under the direction of the Under Secretary of Management. The team is composed of leading bureau representatives currently active in the rule writing and rule review process. Because the Department regulatory procedures are dynamic in nature, there are triggers that promote our on-going review and amendment to our rules and other guidance.

h. How will the agency decide what to do with analysis?

The Under Secretary for Management will decide, with input from the retrospective team and input from the public received in response to this notice.

i. What are the agency's plans for revising rules? How will agencies periodically revisit rules (e.g., though sunset provisions, during regular intervals)?

The Department will review each rule and determine whether or not it should be revised.

j. Describe How the Agency Will Coordinate With Other Federal Agencies That Have Jurisdiction or Similar Interests

As administrators of the International Traffic in Arms Regulations (ITAR) and rules dealing with passport/visa issues, the Department already coordinates with other Federal agencies when it promulgates rules, and will do the same if the retrospective analysis reveals existing rules that must be changed.

k. Will the plan be peer reviewed?

This plan was developed by a team led by the Department's Under Secretary for Management, composed of employees throughout the Department. The public will be given an opportunity to comment on the plan, but it will not be peer-reviewed in the scientific sense.

VI. Components of Retrospective Cost-Benefit Analysis

a. What metrics will the agency use to evaluate regulations after they have been implemented? For example, will the agency use increases in net benefits, increases in cost effectiveness ratios, or something else?

During the initial review process, each specific rule will be evaluated individually. The Department generally implements rules based on statutory requirements, recouping the cost of service, and increase in net benefits.

b. What steps has the agency taken to ensure that it has the data available with which to conduct a robust retrospective analysis?

A working group has been formed consisting of individuals with expertise in rule writing, which will ensure an effective retrospective analysis.

c. How, if at all, will the agency incorporate experimental designs into retrospective analyses?

This does not apply to the Department of State.

VII. Publishing the Agency's Plan Online

a. Will the agency publish its retrospective review plan and available data on its Open Government Web site (http://www.agency.gov/open).

Yes. The point of contact will be T. J. Furlong (FurlongTJ@state.gov) in the Department's Bureau of Administration.

Dated: April 27, 2011.

Patrick F. Kennedy,

Under Secretary for Management,

Department of State.

[FR Doc. 2011–11242 Filed 5–6–11; 8:45 am]

BILLING CODE 4710–24–P

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

7 CFR Parts 301 and 319

[Docket No. APHIS–2010–0127]

RIN 0579–AD34

Movement of Hass Avocados From Areas Where Mediterranean Fruit Fly or South American Fruit Fly Exist

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Proposed rule; reopening of comment period.

SUMMARY: We are reopening the comment period for our proposed rule that would relieve certain restrictions regarding the movement of fresh Hass variety avocados. This action will allow interested persons additional time to prepare and submit comments.

DATES: We will consider all comments that we receive on or before May 18, 2011.

ADDRESSES: You may submit comments by either of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov/fdmspublic/component/main?main=DocketDetail&d=APHIS-2010-0127* to submit or view comments and to view supporting and related materials available electronically.
- *Postal Mail/Commercial Delivery:* Please send one copy of your comment to Docket No. APHIS–2010–0127, Regulatory Analysis and Development, PPD, APHIS, Station 3A–03.8, 4700 River Road Unit 118, Riverdale, MD 20737–1238. Please state that your comment refers to Docket No. APHIS–2010–0127.

Reading Room: You may read any comments that we receive on this docket in our reading room. The reading

room is located in room 1141 of the USDA South Building, 14th Street and Independence Avenue, SW., Washington, DC. Normal reading room hours are 8 a.m. to 4:30 p.m., Monday through Friday, except holidays. To be sure someone is there to help you, please call (202) 690 2817 before coming.

Other Information: Additional information about APHIS and its programs is available on the Internet at *http://www.aphis.usda.gov.*

FOR FURTHER INFORMATION CONTACT: Mr. Tony Román, Import Specialist, Regulations, Permits, and Manuals, PPQ, APHIS, 4700 River Road Unit 133, Riverdale, MD 20737–1231; (301) 734–0627.

SUPPLEMENTARY INFORMATION: On April 4, 2011, we published in the **Federal Register** (76 FR 18419–18421, Docket No. APHIS–2010–0127) a proposal to relieve certain restrictions regarding the movement of fresh Hass variety avocados. Specifically, we proposed to amend our domestic regulations to provide for the interstate movement of Hass avocados from Mediterranean fruit fly quarantined areas in the United States with a certificate if the fruit is safeguarded after harvest in accordance with specific measures. We also proposed to amend our foreign quarantine regulations to remove trapping requirements for Mediterranean fruit fly for Hass avocados imported from the State of Michoacán, Mexico, requirements for treatment or origin from an area free of Mediterranean fruit fly for Hass avocados imported from Peru, and requirements for trapping or origin from an area free of South American fruit fly for Hass avocados imported from Peru.

Comments on the proposed rule were required to be received on or before May 4, 2011. We are reopening the comment period on Docket No. APHIS–2010–0127 for an additional 14 days, until May 18, 2011. This action will allow interested persons additional time to prepare and submit comments. We will also consider all comments received between May 5, 2011, and the date of this document.

Authority: 7 U.S.C. 450, 7701, 7772, and 7781, 7786; 21 U.S.C. 136 and 136a; 7 CFR 2.22, 2.80, and 371.3.

Done in Washington, DC, this 3rd day of May 2011.

Gregory L. Parham,

Administrator, Animal and Plant Health Inspection Service.

[FR Doc. 2011–11173 Filed 5–6–11; 8:45 am]

BILLING CODE 3410–34–P

DEPARTMENT OF AGRICULTURE

Food Safety and Inspection Service

9 CFR Parts 300, 441, 530–534, 537, 539, 540, 541, 544, 548, 550, 552, 555, 557, and 559–561

[Docket No. FSIS–2011–0010]

Public Meetings on the Proposed Rule for Mandatory Inspection of Catfish and Catfish Products

AGENCY: Food Safety and Inspection Service, USDA.

ACTION: Notice of public meetings; request for comment.

SUMMARY: The Food Safety and Inspection Service (FSIS) is announcing that it will hold two public meetings to receive comments on the proposed regulation to implement a program for mandatory inspection of catfish and catfish products (Docket No. FSIS–2008–0031), published February 24, 2011 in the **Federal Register**.

DATES: The first meeting will be held in Washington, DC, on May 24, 2011; 9 a.m. to 12 p.m. EDT, in the USDA Jefferson Auditorium (South Building), 1400 Independence Avenue SW., Washington, DC 20250. Attendees must provide a photo ID to enter the building. The Jefferson Auditorium is located at Wing 6 in the South Building. Attendees should enter the building via Wing 5 or 7 on 14th Street and Independence Avenue, SW.

The second meeting will be held in Stoneville, Mississippi, on May 26, 9 a.m. to 12 p.m., in the Charles Capp Center at the Delta Research and Extension Center of the Mississippi State University. The Charles Capp Center is located at 82 Stoneville Road, Stoneville, MS 38776. The telephone contact number is (662) 686–3442.

Registration will begin at 8:30 a.m. local time at each location.

Meeting times may be adjusted according to public participation and comments.

FOR FURTHER INFORMATION CONTACT: Joan Lindenberger, Office of Public Affairs and Consumer Education, (202) 720–6755, or by e-mail at *Joan.Lindenberger@fsis.usda.gov.*

Registration: Pre-registration for this meeting is recommended. To pre-register, access the FSIS Web site, at *http://www.fsis.usda.gov/News/Meetings_&_Events/.* Select the meeting(s) you wish to attend and complete the registration form as requested. Persons requiring a sign language interpreter or other special accommodations should notify Ms. Lindenberger 15 business days prior to the meeting.

Public Comment: Anyone wishing to make a public comment must indicate that preference during the registration process. In addition to these meetings, interested persons may submit comments on the proposed rule (76 FR 10434) on or before June 24, 2011, using either of the following methods:

Federal eRulemaking Portal: Go to *http://www.regulations.gov* and follow the online instructions at that site for submitting comments.

Mail, including CD–ROMs, and hand- or courier-delivered items: Send to Docket Clerk, U.S. Department of Agriculture, Food Safety and Inspection Service, Room 2–2127 George Washington Carver Center, 5601 Sunnyside Avenue, Mailstop 5272, Beltsville, MD 20705–5272.

Instructions: All items submitted by mail or electronic mail must include the Agency name and docket number FSIS—2008–0031. Comments received in response to this docket will be made available for public inspection and posted without change, including any personal information, to: *http://www.regulations.gov.*

Docket: For access to background documents or comments received, go to the FSIS Docket Room at the address listed above between 8:30 a.m. and 4:30 p.m., Monday through Friday.

SUPPLEMENTARY INFORMATION:

I. Background

U.S. catfish processors, exporters, and importers are currently subject to the U.S. Food and Drug Administration's (FDA's) Hazard Analysis and Critical Control Point (HACCP) regulations for seafood (9 CFR part 123), including catfish, and to other requirements under the Food, Drug and Cosmetic (FD&C) Act (21 U.S.C. 301 *et seq.*). The National Marine Fisheries Service conducts voluntary, fee-for-service inspection and certification programs for catfish under provisions of the Agricultural Marketing Act (7 U.S.C. 1622, 1624) and regulations implementing that Act (50 CFR part 260).

The Food, Conservation, and Energy Act of 2008 (Pub. L. 110–246, § 10016(b)), known as the 2008 Farm Bill, amended the Federal Meat Inspection Act (FMIA) to provide that "catfish, as defined by the Secretary," is a species amenable to the FMIA (21 U.S.C. 601 (w)(2)) and amended the FMIA in other ways to provide for catfish inspection. FSIS, the Agency that administers the FMIA, has proposed regulations to implement the Farm Bill amendments of the FMIA that require inspection of catfish and catfish

products. The proposed regulations cover such subjects as preharvest and transportation, facilities and sanitation, requirements for Sanitation Standard Operation Procedures and HACCP plans, handling and disposal of condemned and inedible materials, product labeling, food ingredients and preparation of products, records required to be kept, and export and import requirements.

Under the proposed regulations, catfish and catfish products imported into the United States would have to come from countries that FSIS has determined to operate systems of inspection equivalent to that of FSIS and from establishments certified by the foreign inspection system as complying with FSIS requirements. Upon arrival at United States points of entry, the catfish and catfish products would be subject to re-inspection before entry into this country.

The proposed rule provides for a transition period during which domestic and international operations would come into compliance with the catfish inspection program. Comments are requested regarding the transition phases and their duration. FSIS plans to announce in the final rule the implementation dates for each transition phase.

In addition, FSIS is soliciting comments on the scope of the proposed regulations and, in particular, whether to define catfish as members of the order Siluriformes or to limit the definition to members of the family Ictaluridae.

II. Purpose of the Meeting and Agenda

The purpose of the public meeting is to provide the public with an opportunity to comment on the proposed rule. Meeting times at each location may be adjusted according to public participation and comments.

The agenda and other documents related to the meetings will be made available for viewing prior to the meeting at the FSIS Web site: *http://www.fsis.usda.gov/News/Meetings_&_Events/.* The proposed rule is available at: *http://www.fsis.usda.gov/OPPDE/rdad/FRPubs/2008-0031.pdf.* The preliminary regulatory impact analysis, the risk assessment, reports on analysis of catfish samples for residues, and links to other documents are can be found at: *http://www.fsis.usda.gov/Regulations_&_Policies/Proposed_Rules/index.asp*

III. Transcripts

As soon as the meeting transcripts are available, they will be accessible on the FSIS Web site at *http://www.fsis.usda.gov/News/Meetings_&_Events/.* The transcripts may also be viewed at the FSIS Docket Room, U.S. Department of Agriculture, Food Safety and Inspection Service, Room 2–2127 George Washington Carver Center, 5601 Sunnyside Avenue, Beltsville, MD 20705.

USDA Nondiscrimination Statement

USDA prohibits discrimination in all its programs and activities on the basis of race, color, national origin, gender, religion, age, disability, political beliefs, sexual orientation, and marital or family status. (Not all prohibited bases apply to all programs.)

Persons with disabilities who require alternative means for communication of program information (Braille, large print, audiotape, etc.) should contact USDA's Target Center at (202) 720–2600 (voice and TTY).

To file a written complaint of discrimination, write USDA, Office of the Assistant Secretary for Civil Rights, 1400 Independence Avenue, SW., Washington, DC 20250–9410 or call (202) 720–5964 (voice and TTY). USDA is an equal opportunity provider and employer.

Additional Public Notification

Public awareness of all segments of rulemaking and policy development is important. Consequently, in an effort to ensure that the public and in particular minorities, women, and persons with disabilities, are aware of this notice, FSIS will announce it online through the FSIS Web site: *http://www.fsis.usda.gov/regulations_&_policies/Federal_Register_Notices/index.asp.*

FSIS also will make copies of this **Federal Register** publication available through the FSIS Constituent Update, which is used to provide information regarding FSIS policies, procedures, regulations, **Federal Register** notices, FSIS public meetings, and other types of information that could affect or would be of interest to our constituents and stakeholders. The *Update* is communicated via Listserv, a free e-mail subscription service delivered to industry, trade, and farm groups, consumer interest groups, allied health professionals, scientific professionals, and other individuals who have requested to be included. The Update also is available on the FSIS Web site. Through Listserv and the Web site, FSIS is able to provide information to a much broader, more diverse audience.

In addition, FSIS offers an e-mail subscription service which provides automatic and customized access to selected food safety news and information. This service is available at *http://www.fsis.usda.gov/news_and_events/email_subscription/.* Options range from recalls to export information to regulations, directives and notices. Customers can add or delete subscriptions themselves, and have the option to password protect their accounts.

Done, at Washington, DC, on May 4, 2011.

Alfred V. Almanza,

Administrator.

[FR Doc. 2011–11213 Filed 5–4–11; 4:15 pm]

BILLING CODE 3410–DM–P

DEPARTMENT OF ENERGY

10 CFR Part 430

[Docket Number EERE–2007–BT–STD–0010]

RIN 1904–AA89

Energy Conservation Program: Energy Conservation Standards for Residential Clothes Dryers and Room Air Conditioners

AGENCY: Office of Energy Efficiency and Renewable Energy, Department of Energy.

ACTION: Proposed rule.

SUMMARY: In a direct final rule published on April 21, 2011, DOE adopted amended energy conservation standards for residential clothes dryers and room air conditioners. As required by EPCA, DOE also published simultaneously a notice of proposed rulemaking (NOPR) that proposed identical energy efficiency standards. The standards set forth in the direct final rule and NOPR were consistent with the consensus agreement that served as the basis for those rulemaking actions. The consensus agreement also provided specific compliance dates for both products—June 1, 2014 for room air conditioners and January 1, 2015 for clothes dryers. In the direct final rule and NOPR, however, DOE provided for a compliance date 3 years after the date of publication in the **Federal Register**, or April 21, 2014. As such, the compliance date of the direct final rule and NOPR did not correspond with the consensus agreement. DOE now proposes to amend the compliance dates set forth in the direct final rule and corresponding NOPR to be consistent with the compliance dates set out in the consensus agreement.

DATES: Written comments and information are requested by June 8, 2011.

ADDRESSES: Any comments submitted must identify the direct final rule for

Energy Conservation Standards for Residential Clothes Dryers and Room Air Conditioners, and provide docket number EERE–2007–BT–STD–0010 and/or regulatory information number (RIN) number 1904–AA89. Comments may be submitted using any of the following methods:

1. *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.

2. *E-mail: home_appliance2.rulemaking@ee.doe.gov.* Include the docket number and/or RIN in the subject line of the message.

3. *Mail:* Ms. Brenda Edwards, U.S. Department of Energy, Building Technologies Program, Mailstop EE–2J, 1000 Independence Avenue, SW., Washington, DC 20585–0121. If possible, please submit all items on a CD. It is not necessary to include printed copies.

4. *Hand Delivery/Courier:* Ms. Brenda Edwards, U.S. Department of Energy, Building Technologies Program, 950 L'Enfant Plaza, SW., Suite 600, Washington, DC 20024. Telephone: (202) 586–2945. If possible, please submit all items on a CD. It is not necessary to include printed copies.

Docket: The docket is available for review at regulations.gov, including **Federal Register** notices, framework documents, public meeting attendee lists and transcripts, comments, and other supporting documents/materials. All documents in the docket are listed in the regulations.gov index. Not all documents listed in the index may be publicly available, such as information that is exempt from public disclosure.

A link to the docket Web page can be found at: *http://www.regulations.gov.*

For further information on how to submit or review public comments or view hard copies of the docket, contact Ms. Brenda Edwards at (202) 586–2945 or e-mail: *Brenda.Edwards@ee.doe.gov.*

FOR FURTHER INFORMATION CONTACT:

Stephen L. Witkowski, U.S. Department of Energy, Office of Energy Efficiency and Renewable Energy, Building Technologies Program, EE–2J, 1000 Independence Avenue, SW., Washington, DC 20585–0121, (202) 586–7463, e-mail: *stephen.witkowski@ee.doe.gov.*

Ms. Elizabeth Kohl, U.S. Department of Energy, Office of General Counsel, GC–71, 1000 Independence Avenue, SW., Washington, DC, 20585–0121, (202) 586–7796, e-mail: *Elizabeth.Kohl@hq.doe.gov*.

SUPPLEMENTARY INFORMATION: DOE published a direct final rule to establish amended energy conservation standards for clothes dryers and room air conditioners on April 21, 2011 (76 FR 22454, April 21, 2011).

EPCA, as amended, grants DOE authority to issue a final rule (hereinafter referred to as a "direct final rule") establishing an energy conservation standard on receipt of a statement submitted jointly by interested persons that are fairly representative of relevant points of view (including representatives of manufacturers of covered products, States, and efficiency advocates) as determined by the Secretary, that contains recommendations with respect to an energy conservation standard that are in accordance with the provisions of 42 U.S.C. 6295(o). EPCA also requires a notice of proposed rulemaking (NOPR) that proposes an identical energy efficiency standard to be published simultaneously with the final rule. A public comment period of at least 110 days must be provided. 42 U.S.C. 6295(p)(4). Not later than 120 days after issuance of the direct final rule, if one or more adverse comments or an alternative joint recommendation are received relating to the direct final rule, the Secretary must determine whether the comments or alternative recommendation may provide a reasonable basis for withdrawal under 42 U.S.C. 6295(o) or other applicable law. If the Secretary makes such a determination, DOE must withdraw the direct final rule and proceed with the simultaneously published notice of proposed rulemaking. DOE must publish in the **Federal Register** the reason why the direct final rule was withdrawn. *Id.*

During the rulemaking proceeding to develop amended standards for clothes dryers and room air conditioners, DOE received the "Agreement on Minimum Federal Efficiency Standards, Smart Appliances, Federal Incentives and Related Matters for Specified Appliances" (the "Joint Petition"), a comment submitted by groups representing manufacturers (the Association of Home Appliance Manufacturers (AHAM), Whirlpool Corporation (Whirlpool), General Electric Company (GE), Electrolux, LG Electronics, Inc. (LG), BSH Home Appliances (BSH), Alliance Laundry Systems (ALS), Viking Range, Sub-Zero Wolf, Friedrich A/C, U–Line, Samsung, Sharp Electronics, Miele, Heat Controller, AGA Marvel, Brown Stove, Haier, Fagor America, Airwell Group, Arcelik, Fisher & Paykel, Scotsman Ice, Indesit, Kuppersbusch, Kelon, and DeLonghi); energy and environmental advocates (American Council for an Energy Efficient Economy (ACEEE), Appliance Standards Awareness Project (ASAP), Natural Resources Defense Council (NRDC), Alliance to Save Energy (ASE), Alliance for Water Efficiency (AWE), Northwest Power and Conservation Council (NPCC), and Northeast Energy Efficiency Partnerships (NEEP)); and consumer groups (Consumer Federation of America (CFA) and the National Consumer Law Center (NCLC)) (collectively, the "Joint Petitioners"). This collective set of comments, which DOE refers to in this notice as the "Joint Petition"[1] or "Consensus Agreement" recommends specific energy conservation standards for residential clothes dryers and room air conditioners that, in the commenters' view, would satisfy the EPCA requirements in 42 U.S.C. 6295(o). The Joint Petition also sets forth compliance dates for these recommended standards. The compliance dates are June 1, 2014 for room air conditioners and January 1, 2015 for clothes dryers.

As discussed in the direct final rule, DOE determined that the relevant criteria under 42 U.S.C. 6295(p)(4) were satisfied and that it was appropriate to adopt amended energy conservation standards for clothes dryers and room air conditioners through the direct final rule. In publishing the direct final rule, however, DOE inadvertently specified a compliance date 3 years after publication of the direct final rule in the **Federal Register**, rather than specifying the compliance dates set forth in the Joint Petition. In today's proposed rule, DOE proposes to adopt those compliance dates. Specifically, for room air conditioners, DOE proposes a compliance date of June 1, 2014, and for clothes dryers, DOE proposes a compliance date of January 1, 2015. DOE seeks comment on these compliance dates.

Procedural Issues and Regulatory Review

The regulatory reviews conducted for this proposed rule remain unchanged from those conducted for the direct final rule establishing the amended energy conservation standards. DOE does not believe that the changes in the compliance dates—approximately one and a half months for room air conditioners and eight and a half months for clothes dryers—would result in changes to those analyses. Please see the direct final rule for further details.

[1] DOE Docket No. EERE–2007–BT–STD–0010, Comment 35. DOE considered the Joint Petitioners comments to supersede earlier comments by the listed parties regarding issues subsequently discussed in the Joint Petition.

List of Subjects in 10 CFR Part 430

Administrative practice and procedure, Confidential business information, Energy conservation, Household appliances, Reporting and recordkeeping requirements, and Small businesses.

Issued in Washington, DC, on May 3, 2011.

Kathleen Hogan,

Deputy Assistant Secretary for Energy Efficiency, Office of Technology Development, Energy Efficiency and Renewable Energy.

For the reasons set forth in the preamble, DOE proposes to amend chapter II, subchapter D, of title 10 of the Code of Federal Regulations, as set forth below:

PART 430—ENERGY CONSERVATION PROGRAM FOR CONSUMER PRODUCTS

1. The authority citation for part 430 continues to read as follows:

Authority: 42 U.S.C. 6291–6309; 28 U.S.C. 2461 note.

2. Revise § 430.32 paragraphs (b), and (h) to read as follows:

§ 430.32 Energy and water conservation standards and their effective dates.

* * * * *

(b) *Room air conditioners.*

Product class	Energy efficiency ratio, effective from Oct. 1, 2000 to May 31, 2014	Combined energy efficiency ratio, effective as of June 1, 2014
1. Without reverse cycle, with louvered sides, and less than 6,000 Btu/h	9.7	11.0
2. Without reverse cycle, with louvered sides, and 6,000 to 7,999 Btu/h	9.7	11.0
3. Without reverse cycle, with louvered sides, and 8,000 to 13,999 Btu/h	9.8	10.9
4. Without reverse cycle, with louvered sides, and 14,000 to 19,999 Btu/h	9.7	10.7
5a. Without reverse cycle, with louvered sides, and 20,000 to 24,999 Btu/h	8.5	9.4
5b. Without reverse cycle, with louvered sides, and 25,000 Btu/h or more		9.0
6. Without reverse cycle, without louvered sides, and less than 6,000 Btu/h	9.0	10.0
7. Without reverse cycle, without louvered sides, and 6,000 to 7,999 Btu/h	9.0	10.0
8a. Without reverse cycle, without louvered sides, and 8,000 to 10,999 Btu/h	8.5	9.6
8b. Without reverse cycle, without louvered sides, and 11,000 to 13,999 Btu/h		9.5
9. Without reverse cycle, without louvered sides, and 14,000 to 19,999 Btu/h	8.5	9.3
10. Without reverse cycle, without louvered sides, and 20,000 Btu/h or more	8.5	9.4
11. With reverse cycle, with louvered sides, and less than 20,000 Btu/h	9.0	9.8
12. With reverse cycle, without louvered sides, and less than 14,000 Btu/h	8.5	9.3
13. With reverse cycle, with louvered sides, and 20,000 Btu/h or more	8.5	9.3
14. With reverse cycle, without louvered sides, and 14,000 Btu/h or more	8.0	8.7
15. Casement-Only	8.7	9.5
16. Casement-Slider	9.5	10.4

* * * * *

(h) *Clothes dryers.* (1) Gas clothes dryers manufactured after January 1, 1988 shall not be equipped with a constant burning pilot.

(2) Clothes dryers manufactured on or after May 14, 1994 and before January 1, 2015, shall have an energy factor no less than:

Product class	Energy factor (lbs/kWh)
i. Electric, Standard (4.4 ft^3 or greater capacity)	3.01
ii. Electric, Compact (120V) (less than 4.4 ft^3 capacity)	3.13
iii. Electric, Compact (240V) (less than 4.4 ft^3 capacity)	2.90
iv. Gas	2.67

(3) Clothes dryers manufactured on or after January 1, 2015, shall have a combined energy factor no less than:

Product class	Combined energy factor (lbs/kWh)
i. Vented Electric, Standard (4.4 ft^3 or greater capacity)	3.73
ii. Vented Electric, Compact (120V) (less than 4.4 ft^3 capacity)	3.61
iii. Vented Electric, Compact (240V) (less than 4.4 ft^3 capacity)	3.27
iv. Vented Gas	3.30
v. Ventless Electric, Compact (240V) (less than 4.4 ft^3 capacity)	2.55
vi. Ventless Electric, Combination Washer-Dryer	2.08

* * * * *

[FR Doc. 2011–11237 Filed 5–6–11; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2010–1240; Airspace Docket No. 10–ASW–18]

Proposed Establishment of Class E Airspace; Ranger, TX

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This action proposes to establish Class E airspace at Ranger, TX. Controlled airspace is necessary to accommodate new Standard Instrument Approach Procedures (SIAP) at Cook Canyon Ranch Airport. The FAA is taking this action to enhance the safety and management of Instrument Flight Rules (IFR) operations for SIAPs at the airport.

DATES: 0901 UTC. Comments must be received on or before June 23, 2011.

ADDRESSES: Send comments on this proposal to the U.S. Department of Transportation, Docket Operations, 1200 New Jersey Avenue, SE., West Building Ground Floor, Room W12–140, Washington, DC 20590–0001. You must identify the docket number FAA–2010–1240/Airspace Docket No. 10–ASW–18, at the beginning of your comments. You may also submit comments through the Internet at *http://www.regulations.gov.* You may review the public docket containing the proposal, any comments received, and any final disposition in person in the Dockets Office between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The Docket Office (telephone 1–800–647–5527), is on the ground floor of the building at the above address.

FOR FURTHER INFORMATION CONTACT: Scott Enander, Central Service Center, Operations Support Group, Federal Aviation Administration, Southwest Region, 2601 Meacham Blvd., Fort Worth, TX 76137; *telephone:* (817) 321–7716.

SUPPLEMENTARY INFORMATION:

Comments Invited

Interested parties are invited to participate in this proposed rulemaking by submitting such written data, views, or arguments, as they may desire. Comments that provide the factual basis supporting the views and suggestions presented are particularly helpful in developing reasoned regulatory decisions on the proposal. Comments are specifically invited on the overall regulatory, aeronautical, economic, environmental, and energy-related aspects of the proposal. Communications should identify both docket numbers and be submitted in triplicate to the address listed above. Commenters wishing the FAA to acknowledge receipt of their comments on this notice must submit with those comments a self-addressed, stamped postcard on which the following statement is made: "Comments to Docket No. FAA–2010–1240/Airspace Docket No. 10–ASW–18." The postcard will be date/time stamped and returned to the commenter.

Availability of NPRMs

An electronic copy of this document may be downloaded through the Internet at *http://www.regulations.gov.* Recently published rulemaking documents can also be accessed through the FAA's web page at *http://www.faa.gov/airports_airtraffic/air_traffic/publications/airspace_amendments/.*

You may review the public docket containing the proposal, any comments received and any final disposition in person in the Dockets Office (see **ADDRESSES** section for address and phone number) between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. An informal docket may also be examined during normal business hours at the office of the Central Service Center, 2601 Meacham Blvd, Fort Worth, TX 76137.

Persons interested in being placed on a mailing list for future NPRMs should contact the FAA's Office of Rulemaking (202) 267–9677, to request a copy of Advisory Circular No. 11–2A, Notice of Proposed Rulemaking Distribution System, which describes the application procedure.

The Proposal

This action proposes to amend Title 14, Code of Federal Regulations (14 CFR), Part 71 by establishing Class E airspace extending upward from 700 feet above the surface for new standard instrument approach procedures at Cook Canyon Ranch Airport, Ranger, TX. Controlled airspace is needed for the safety and management of IFR operations at the airport.

Class E airspace areas are published in Paragraph 6005 of FAA Order 7400.9U, dated August 18, 2010 and effective September 15, 2010, which is incorporated by reference in 14 CFR 71.1. The Class E airspace designation listed in this document would be published subsequently in the Order.

The FAA has determined that this proposed regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. It, therefore, (1) is not a "significant regulatory action" under Executive Order 12866; (2) is not a "significant rule" under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a Regulatory Evaluation as the anticipated impact is so minimal. Since this is a routine matter that will only affect air traffic procedures and air navigation, it is certified that this rule, when promulgated, will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the U.S. Code. Subtitle 1, Section 106 describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency's authority. This rulemaking is promulgated under the authority described in Subtitle VII, Part A, Subpart I, Section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This regulation is within the scope of that authority as it would establish controlled airspace at Cook Canyon Ranch Airport, Ranger, TX.

List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (Air).

The Proposed Amendment

In consideration of the foregoing, the Federal Aviation Administration proposes to amend 14 CFR Part 71 as follows:

PART 71—DESIGNATION OF CLASS A, B, C, D, AND E AIRSPACE AREAS; AIR TRAFFIC SERVICE ROUTES; AND REPORTING POINTS

1. The authority citation for part 71 continues to read as follows:

Authority: 49 U.S.C. 106(g); 40103, 40113, 40120; E.O. 10854, 24 FR 9565, 3 CFR, 1959–1963 Comp., p. 389.

§ 71.1 [Amended]

2. The incorporation by reference in 14 CFR 71.1 of FAA Order 7400.9U, Airspace Designations and Reporting Points, dated August 18, 2010, and effective September 15, 2010, is amended as follows:

Paragraph 6005 Class E Airspace areas extending upward from 700 feet or more above the surface of the earth.

* * * * *

ASW TX E5 Ranger, TX [New]

Cook Canyon Ranch Airport, TX
(Lat. 32°25′54″ N., long. 98°35′41″ W.)

That airspace extending upward from 700 feet above the surface within a 6.7-mile radius of Cook Canyon Ranch Airport.

Issued in Fort Worth, TX, on April 27, 2011.

Richard J. Kervin, Jr.,

Acting Manager, Operations Support Group, ATO Central Service Center.

[FR Doc. 2011–11162 Filed 5–6–11; 8:45 am]

BILLING CODE 4901–13–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

21 CFR Part 1316

DEPARTMENT OF JUSTICE

28 CFR Parts 8 and 9

[Docket No. OAG 127; AG Order No. 3263–2011]

RIN 1105–AA74

Consolidation of Seizure and Forfeiture Regulations

AGENCY: Department of Justice.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Department of Justice (the Department) proposes to revise, consolidate, and update its seizure and forfeiture regulations, to conform those regulations to the Civil Asset Forfeiture Reform Act (CAFRA) of 2000 to reflect organizational changes that have occurred within the Department, and to make other changes.

DATES: Written comments must be postmarked and electronic comments must be submitted on or before July 8, 2011. Commenters should be aware that the electronic Federal Docket Management System (FDMS) will not accept comments after Midnight Eastern Time on the last day of the comment period.

ADDRESSES: Comments may be mailed to Legal Policy, Asset Forfeiture and Money Laundering Section, Criminal Division, U.S. Department of Justice, 1400 New York Avenue, NW., Bond Building, Tenth Floor, Washington, DC 20005. Comments are available for public inspection at the above address by calling (202) 514–1263 to arrange for an appointment. To ensure proper handling, please reference OAG Docket No. 127 on your correspondence. You may submit comments electronically or view an electronic version of this proposed rule at *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Beliue Risher, Editor, 1400 New York Avenue, NW., Room 2218, Bond Building, Washington, DC 20530. Telephone: (202) 514–1263.

SUPPLEMENTARY INFORMATION:

POSTING OF PUBLIC COMMENTS: Please note that all comments received are considered part of the public record and made available for public inspection online at *http://www.regulations.gov.* Such information includes personal identifying information (such as your name, address, *etc.*) voluntarily submitted by the commenter.

If you want to submit personal identifying information (such as your name, address, *etc.*) as part of your comment, but do not want it to be posted online, you must include the phrase "PERSONAL IDENTIFYING INFORMATION" in the first paragraph of your comment. You also must put all the personal identifying information you do not want posted online in the first paragraph of your comment and identify what information you want redacted.

If you want to submit confidential business information as part of your comment but do not want it to be posted online, you must include the phrase "CONFIDENTIAL BUSINESS INFORMATION" in the first paragraph of your comment. You also must prominently identify confidential business information to be redacted within the comment. If a comment has so much confidential business information that it cannot be effectively redacted, all or part of that comment may not be posted on *http://www.regulations.gov.*

Personal identifying information and confidential business information identified and located as set forth above will be placed in the agency's public docket file, but not posted online. If you wish to inspect the agency's public docket file in person by appointment, please see the **FOR FURTHER INFORMATION CONTACT** paragraph.

The reason that the Department is requesting electronic comments before Midnight Eastern Time on the day the comment period closes is because the inter-agency FDMS, which receives electronic comments at www.regulations.gov, terminates the public's ability to submit comments at Midnight Eastern Time on the day the comment period closes.

Commenters in time zones other than Eastern may want to take this fact into account so that their electronic comments can be received. The constraints imposed by the FDMS online system do not apply to comments submitted via U.S. mail, which will be considered as timely filed if they are postmarked before Midnight on the day the comment period closes.

I. Overview

First, the proposed rule recognizes that the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) is now part of the Department of Justice. On November 25, 2002, the President signed into law the Homeland Security Act (HSA) of 2002, Public Law 107–296, 116 Stat. 2135. Section 1111 of the HSA established in the Department of Justice the "Bureau of Alcohol, Tobacco, Firearms, and Explosives" and generally transferred law enforcement functions, and seizure and forfeiture authority, of the Bureau of Alcohol, Tobacco, and Firearms from the Department of the Treasury to the Department of Justice. This transfer became effective on January 24, 2003. By this rule, the Department proposes consolidating its regulations governing the seizure and administrative forfeiture of property by ATF, the Drug Enforcement Administration (DEA), and the Federal Bureau of Investigation (FBI). Among other things, this rulemaking identifies the scope of these regulations, updates definitions, identifies the scope of authority available to each seizing agency (ATF, DEA, and FBI) to seize property for forfeiture, and provides procedures governing practical issues regarding the seizure, custody, inventory, appraisal, settlement, and release of property subject to forfeiture. *See* proposed sections 8.1–8.7 of this rule.

Second, the rule proposes conforming the seizure and forfeiture regulations of ATF, DEA, FBI, and the Department's Criminal Division to address procedural changes necessitated by the Civil Asset Forfeiture Reform Act (CAFRA) of 2000, Public Law 106–185, 114 Stat. 202. The rule also incorporates CAFRA's innocent owner defense into the remission regulations. Where CAFRA is silent or ambiguous on a subject relating to administrative forfeiture procedure, the proposed rule interprets CAFRA based on case law and agency expertise and experience.

Third, the rule proposes updating the regulations to conform with other authorities and current forfeiture practice. Thus, proposed § 8.14 adds a provision to the Department's regulations allowing for the pre-forfeiture disposition of seized property when the property is liable to perish or to waste or to be greatly reduced in value while being held for forfeiture, or when the expense of holding the property is or will be disproportionate to its value. Section 8.11 clarifies that administrative and criminal judicial forfeiture proceedings are not mutually exclusive, and § 8.16 affirms that the United States is not liable for attorney fees in any administrative forfeiture proceeding. Section 8.23 adds a provision defining the allowable re-delegations of authority under the regulations. Section 8.9(a)(1) updates the forfeiture regulations by adding the option of publishing notice for administrative forfeitures on an official

government Internet site instead of in a newspaper.

Fourth, the proposed rule amends the list of designated officials at 28 CFR part 9 governing petitions for remission or mitigation of forfeiture, clarifies the existing regulations pertaining to victims, and makes remission available to third parties who reimburse victims under an indemnification agreement.

II. Discussion

A. Consolidation of the Regulations Governing the Seizure and Forfeiture of Property by ATF, DEA, and FBI

Consolidating the forfeiture regulations used by ATF (formerly 27 CFR part 72), DEA (21 CFR part 1316, subparts E and F), and FBI (28 CFR part 8 and 21 CFR part 1316, subparts E and F) will achieve greater consistency within the Department and will promote overall fairness in the administrative forfeiture process.

The proposed rule removes 21 CFR part 1316, subparts E and F and replaces them by adding an amended 28 CFR part 8 governing the seizure and forfeiture of property by each agency. Part 8 is divided into subparts A, B, and C. Subpart A contains generally applicable provisions for seizures and forfeitures by ATF, DEA, and FBI. Subpart B contains expedited procedures for property seized by DEA and FBI for violations involving personal use quantities of a controlled substance. Subpart C includes the permitted re-delegations of authority under these regulations.

However, this consolidation does not constitute the entirety of the Department's forfeiture regulations. ATF continues to enforce and administer the provisions of the National Firearms Act (NFA), ch. 757, 48 Stat. 1236 (1934) (codified at 26 U.S.C. ch. 53). Pursuant to 18 U.S.C. 983(i)(2), Internal Revenue Code forfeitures, including NFA forfeitures, are not subject to CAFRA's procedural requirements. NFA civil forfeiture procedure is governed, for the most part, by the Customs laws (19 U.S.C. 1602–1618) including the notice and cost bond requirements. In addition, pursuant to the Customs laws, the Government's initial burden of proof in an NFA civil forfeiture is to demonstrate probable cause to believe that the property is forfeitable. Further, there is no innocent ownership defense to forfeiture under the NFA. However, NFA forfeitures are subject to CAFRA's attorney fees requirement.

B. CAFRA Procedural Changes Incorporated in the Proposed Rule

CAFRA's section 2 created 18 U.S.C. 983, which includes the general rules for civil forfeiture proceedings. This rule proposes to implement certain procedural changes in the conduct of administrative forfeitures as required by 18 U.S.C. 983. These changes address procedures relating to notice of seizure, filing of claims, hardship requests, and releases of property.

Notice of seizure. Section 983(a)(1) establishes time deadlines and other procedures for the sending of personal written notices of seizures to parties with a potential interest in the property. These time deadlines and procedures are in addition to, and in some respects different from, procedures under the Customs laws. The Customs laws forfeiture procedures (19 U.S.C. 1602–1618), which are incorporated by reference "insofar as applicable" in forfeiture statutes enforced by the Department of Justice (*e.g.,* 21 U.S.C. 881(d)), require that "[w]ritten notice of seizure together with information on the applicable procedures shall be sent to each party who appears to have an interest in the seized property." *See* 19 U.S.C. 1607. CAFRA, as codified at 18 U.S.C. 983(a)(1), requires that notice be sent within 60 days of seizure, or within 90 days of a seizure by a state or local agency, or within 60 days of establishing the interested party's identity if it is not known at the time of seizure. CAFRA also provides that a supervisory official of the seizing agency may grant a single 30-day extension if certain conditions are satisfied and that extensions thereafter may only be granted by a court. Section 8.9 of the proposed rule incorporates these notice-related provisions of CAFRA.

Filing of administrative claims. Section 983(a)(2) of title 18 of the United States Code modifies the procedure for filing a claim to seized property. The Customs laws procedure applicable to claims in Department of Justice forfeitures provides that, to contest an administrative forfeiture, a claimant has 20 days after the first published notice of seizure to file with the seizing agency both a claim and a cost bond for $5,000 or 10 percent of the property's value, whichever is less, but not less than $250. *See* 19 U.S.C. 1608. Section 983(a)(2) eliminates the cost bond requirement for forfeitures covered by CAFRA and allows the filing of claims not later than the deadline set forth in a personal notice letter. The deadline must be at least 35 days after the date the letter was mailed. Persons not receiving a notice letter must file a claim within 30 days after the date of final publication of notice of seizure. Section 983(a)(2) also adds provisions specifying the information required for a valid claim. It reflects the amendments to 18 U.S.C. 983(a)(2)(C)(ii) in the Paul Coverdell National Forensic Sciences Improvement Act of 2000, Public Law 106–561, 114 Stat. 2787, which retroactively deleted CAFRA's original requirements that claimants provide with their claims documentary evidence supporting their interest in the seized property and state that their claims are not frivolous. Consequently, pursuant to section 21 of CAFRA (establishing CAFRA's effective date), the amended section 983(a)(2)(C)(ii) applies to any forfeiture proceeding commenced on or after August 23, 2000. Section 8.10 of the proposed rule incorporates these section 983(a)(2) changes to the claim procedures.

Release of seized property if forfeiture is not commenced. Section 8.13 of the proposed rule provides procedures to implement 18 U.S.C. 983(a)(3). Section 983(a)(3) requires the release of seized property pursuant to regulations promulgated by the Attorney General and prohibits the United States from pursuing further action for civil forfeiture if the United States does not institute judicial forfeiture proceedings against the property within 90 days after an administrative claim has been filed and no extension of time has been obtained from a court.

Hardship request. Section 8.15 of the proposed rule implements 18 U.S.C. 983(f), which provides procedures and criteria for the release of seized property (subject to certain exceptions) pending the completion of judicial forfeiture proceedings when a claimant's request for such release establishes that continued government custody will cause substantial hardship that outweighs the risk that the property will not remain available for forfeiture.

Expedited release of property. Subpart B, §§ 8.17 through 8.22 of the proposed rule, incorporates and amends, to the extent required by CAFRA, the pre-existing regulations for expedited forfeiture proceedings for certain property. These regulations, 21 CFR part 1316, subpart F, provided expedited procedures for conveyances seized for drug-related offenses and property seized for violations involving personal use quantities of a controlled substance. By repealing 21 U.S.C. 888 (expedited procedures for seized conveyances), CAFRA eliminated the statutory basis for the expedited procedure regulations pertaining to drug-related conveyance seizures. Accordingly, §§ 8.17 through

8.22 of the proposed rule omit the 21 CFR part 1316, subpart F provisions applicable to drug-related conveyance seizures. The remaining provisions apply only where property is seized for administrative forfeiture involving controlled substances in personal use quantities.

Remissions and mitigations. For consistency with CAFRA's uniform innocent owner defense, 18 U.S.C. 983(d), the proposed rule incorporates the innocent owner provisions of sections 983(d)(2)(A) and 983(d)(3)(A) in a new 28 CFR 9.5(a)(l).

Forfeitures affected by CAFRA and the proposed rule. CAFRA's changes apply to civil forfeiture proceedings commenced on or after August 23, 2000, with the exception of civil forfeitures under the following: The Tariff Act of 1930 or any other provision of law codified in title 19; the Internal Revenue Code of 1986; the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 301 *et seq.*); the Trading with the Enemy Act (50 U.S.C. App. 1 *et seq.*) or the International Emergency Economic Powers Act (50 U.S.C. 1701 *et seq.*); or section 1 of title VI of the Act of June 15, 1917 (22 U.S.C. 401). These regulations apply to all forfeitures administered by the Department of Justice with the exception of seizures and forfeitures under the statutes listed in 18 U.S.C. 983(i). The authority of seizing agencies to conduct administrative forfeitures derives from the procedural provisions of the Customs laws where those provisions are incorporated by reference in the substantive forfeiture statutes enforced by the agencies.

C. Changes to the Previous Regulations Governing the Seizure and Forfeiture of Property by ATF, DEA, and FBI

Pre-forfeiture disposition. The provision providing for the pre-forfeiture disposition of seized property, § 8.14, is needed to implement the authority of 19 U.S.C. 1612(b), which is one of the procedural Customs statutes incorporated by reference into the forfeiture statutes enforced by the Department of Justice. Section 1612(b) authorizes pre-forfeiture disposal of seized property, pursuant to regulations, when the property is liable to perish or to waste or to be greatly reduced in value by keeping, or when the costs of maintaining the property pending forfeiture are disproportionate to the property's value. The proposed rule enables the Department of Justice to use the authority of section 1612(b) in appropriate cases.

Internet publication. The proposed rule updates the forfeiture regulations by adding, in § 8.9(a)(1)(ii), a provision for the publication of administrative forfeiture notices on an official government Internet site instead of in newspapers. The statute governing the publication of notice in administrative forfeiture proceedings, 19 U.S.C. 1607, does not require a specific means of publication. Section 8.9(a)(1)(ii) will provide ATF, DEA, and FBI with the choice to use the Internet as a more effective and less costly alternative to the newspaper publication provided for in § 8.9(a)(1)(i). This grant of authority parallels a similar grant of authority in Rule G(4)(a)(iv)(C) of the Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions.

Pursuant to Rule G(4)(a)(iv)(C), in all civil judicial forfeitures, the Government may now employ the option of giving public notice through the Internet rather than in a newspaper. Section 8.9(a)(1)(ii) will permit the Department of Justice agencies to likewise use the Internet to provide notice in administrative forfeitures, a cost savings that is particularly important as the volume of administrative forfeitures is much greater than judicial forfeitures. There is strong statistical proof that Internet access is now available to the vast majority of United States residents. Internet access continues to grow, while newspaper circulation is declining, and in some markets, the option to publish in a traditional newspaper may not be available in the next few years.

D. Regulations at 28 CFR Part 9 Governing the Remission or Mitigation of Forfeitures

This proposed rule includes modifications to the regulations governing the remission or mitigation of forfeiture at 28 CFR part 9. Sections 9.3(e)(2) is revised by deleting references to DEA's "Office of Chief Counsel" and referring instead to DEA's "Forfeiture Counsel" as the pertinent official in DEA forfeiture cases, by deleting references to ATF's "Special Agent in Charge, Asset Forfeiture and Seized Property Branch," and referring instead to ATF's "Office of Chief Counsel, Forfeiture Counsel," as the pertinent official in ATF forfeiture cases, and by updating the addresses for both DEA and ATF. Section 9.1 changes the designation of the official within ATF to whom authority to grant remission and mitigation has been delegated.

Second, the definition of "victim" in § 9.2 is modified to make remission available to qualified third parties who reimburse a victim pursuant to an indemnification agreement. In addition, § 9.8 is modified to specify the procedures applicable to persons seeking remission as victims.

E. Summary of the Impact of the Proposed Changes on the Public

CAFRA enacted additional due process protections for property owners in Federal civil forfeiture proceedings. Section 2(a) of CAFRA, codified at 18 U.S.C. 983, requires prompt notification of administrative forfeiture proceedings. As a general rule, in any administrative forfeiture proceeding under a civil forfeiture statute, the Government must send written notice of the seizure and the Government's intent to forfeit the property to all persons known to the Government who might have an interest in the property within 60 days of a seizure (or 90 days of a seizure made by state or local law enforcement authorities and transferred for Federal forfeiture).

CAFRA also changed the procedure for filing administrative claims. Section 983(a)(2)(B) dictates that when the agency both publishes and sends notice of the seizure and its intent to forfeit the property, an owner who receives notice by mail has 35 days from the date of mailing, and if the personal notice is sent but not received, an owner has 30 days from the date of final publication of notice of the seizure, to file a claim with the agency. In addition, the notice provision in § 8.9(a)(1)(ii) was updated to allow the agencies to publish administrative forfeiture notices on the Internet instead of in newspapers, consistent with the procedure for civil judicial forfeitures under Rule G(4)(a)(iv)(C).

The filing of a valid claim compels the agency to refer the matter to the U.S. Attorney. To preserve the option to seek civil judicial forfeiture, the U.S. Attorney must do one of the following within 90 days: (1) Commence a civil judicial forfeiture action against the seized property; (2) obtain an indictment alleging the property is subject to criminal forfeiture; (3) obtain a good cause extension of the deadline from the district court; or (4) return the property pending the filing of a complaint. If the Government fails to take any of these steps within the statutory deadline, it must promptly release the property and is barred from taking any further action to civilly forfeit the property in connection with the underlying offense.

Prior to CAFRA, claims in an administrative forfeiture required an accompanying bond of either $5,000 or 10 percent of the value of the seized property, whichever was lower. Section 983(a)(2) eliminated the bond

requirement, in forfeitures covered by CAFRA, to give the property owner greater access to Federal court. However, to prevent frivolous claims, CAFRA requires the claimant to state the basis for his or her interest in the property in the claim under oath.

Under CAFRA, claimants also have a right to petition for immediate release of seized property on grounds of hardship with a 30-day deadline on judicial resolution of such petitions. Section 983(f)(7) provides that if the court grants a petition, it may also enter any order necessary to ensure that the value of the property is maintained during the pendency of the forfeiture action, including permitting inspection, photographing, and inventory of the property, fixing a bond pursuant to Rule E(5) of the Supplemental Rules for Certain Admiralty or Maritime Claims, or requiring the claimant to obtain or maintain insurance on the property. It also provides that the Government may place a lien or file a *lis pendens* on the property.

It is important to note that CAFRA's deadlines apply only to civil forfeiture actions initiated by commencement of an administrative proceeding under section 983(a) and do not apply to actions commenced solely as civil judicial forfeitures. However, the vast majority of civil forfeitures are handled administratively.

CAFRA changed the procedures for the expedited release of conveyances and property seized for drug offenses to apply only where property is seized for administrative forfeiture involving personal use quantities of a controlled substance.

Although CAFRA enacted a provision granting attorney fees to substantially prevailing parties in civil judicial forfeitures, the regulations make it clear that the United States is *not* liable for attorney fees or costs in administrative forfeiture proceedings, even if the matter is referred to the U.S. Attorney and the U.S. Attorney declines to initiate a judicial forfeiture on the property.

In addition to implementing these CAFRA reforms, the new regulations allow the agencies to sell property that is deteriorating rapidly in order to preserve the property's value pending resolution of the forfeiture. This disposition must be authorized by agency headquarters. The regulations also specify that the seizing agency must promptly deposit any seized U.S. currency over $5,000 into the Seized Asset Deposit Fund pending forfeiture. The only exception is for currency that must be retained because it has a significant, independent, tangible evidentiary purpose.

The new rule also changes some of the procedures relating to crime victims in 28 CFR part 9. The definition of victim is modified to make remission available to qualified third parties who reimburse a victim pursuant to an insurance or other indemnification agreement. *See* proposed § 9.2(w). In addition, § 9.8 is reorganized and a new paragraph (a) is added to specify the filing procedures applicable to persons seeking remission as victims. This revision is necessary because the current petition filing procedures in § 9.4 are applicable to owners and lienholders, but not to victims. Section 9.8(i) clarifies that the amount of compensation available to a particular victim may not exceed the victim's share of the net proceeds of the forfeiture associated with the activity that caused the victim's loss. In other words, a victim is not entitled to full compensation, but only the amount of compensation available from the forfeited property. In addition, the new rule makes the statutory innocent owner provisions at 18 U.S.C. 983(d)(2)(A) and (d)(3)(A) applicable to all owner and lienholder petitions for remission.

Regulatory Certifications

Executive Order 12866—Regulatory Planning and Review

This regulation has been drafted and reviewed in accordance with Executive Order 12866, section 1(b), Principles of Regulation. The Department of Justice has determined that this rule is a "significant regulatory action" under Executive Order 12866, section 3(f), and accordingly this rule has been reviewed by the Office of Management and Budget (OMB). The costs that this rule imposes (such as additional personnel and higher administrative overhead) fall upon the Justice Department, not upon the general public. The benefits of this rule, however, are numerous. The rule increases the efficiency of forfeitures, ensures that the agencies provide prompt due process and notice, helps maintain property values, ensures that property is promptly returned to third parties if appropriate, eliminates the cost bond and its administrative burden, and requires more effective processing and handling of currency. Publishing administrative forfeiture notices on the Internet accomplishes a substantial financial benefit for the agencies.

Executive Order 12630—Governmental Actions and Interference With Constitutionally Protected Property Rights

Executive Order 12630, section 2(a)(3) specifically exempts from the definition of "policies that have takings implications" the seizure and forfeiture of property for violations of law. Therefore, no actions were deemed necessary under the provisions of Executive Order 12630.

Executive Order 12988—Civil Justice Reform

This rule meets the applicable standards set forth in sections 3(a) and 3(b)(2) of Executive Order 12988.

Executive Order 13132—Federalism

This rule will not have substantial direct effects on the States, on the relationship between the Federal Government and the States, or on distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 13132, it is determined that this rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

Regulatory Flexibility Act

The Attorney General, in accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)), has reviewed this regulation, and by approving it certifies that it will not have a significant economic impact on a substantial number of small entities. Some owners of property subject to administrative or judicial forfeiture under laws enforced by ATF, DEA, FBI, and the Department's Criminal Division may be small businesses as defined under the Regulatory Flexibility Act, and under size standards established by the Small Business Administration. Although the regulations affect every administrative forfeiture initiated by ATF, DEA, and FBI, and every remission or mitigation decision by the agencies or the Department's Criminal Division, the rule will not change existing forfeiture laws. It will only revise and consolidate the seizure and forfeiture regulations of ATF, DEA, FBI, and the Criminal Division to conform to CAFRA, and to fill gaps and address ambiguities in CAFRA and other seizure and forfeiture laws. Accordingly, an initial regulatory flexibility analysis is not required.

Small Business Regulatory Enforcement Fairness Act of 1996

This rule is not a major rule as defined by section 251 of the Small Business Regulatory Enforcement

Fairness Act of 1996, 5 U.S.C. 804. This rule will not result in an annual effect on the economy of $100,000,000 or more, a major increase in costs or prices, or significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of United States-based companies to compete with foreign-based companies in domestic and export markets.

Unfunded Mandates Reform Act of 1995

This rule will not result in the expenditure by state, local and Tribal governments, in the aggregate, or by the private sector, of $100,000,000 or more in any one year, and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

Paperwork Reduction Act of 1995

This proposed rule does not contain any information collection requirements that require approval by OMB under the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.*

The proposed rule is exempt from the Paperwork Reduction Act (PRA) of 1995, Public Law 104–13, 109 Stat. 163, because it does not require a form within the meaning of the Act and because it falls within the exceptions listed in 44 U.S.C. 3518 and 5 CFR § 1320.4. The proposed rule updates the existing regulations to comply with CAFRA. CAFRA included key reforms regarding the rights of property owners in Federal forfeiture. Thus, the purpose of the proposed rule is not to gather information about the claimants or petitioners, but rather to give them an opportunity, as provided by CAFRA, to prove their claim in the forfeiture proceeding.

Under 44 U.S.C. 3502(3)(A), a form falls within the PRA if it calls for answers to identical questions posed to ten or more persons. The proposed rule allows owners and victims to file the following claims, petitions, or requests. None of the filings needs to be in a particular form, but the regulations require the filer to provide certain information, as outlined below.

(1) *Claim:* The claim must identify the specific property being claimed, the claimant's identity and interest in the property, and must be made under oath by the claimant. *See* § 8.10.

(2) *Petition for remission or mitigation of seized property:* The petitioner must include his or her identification information, specifics about the seizure, a complete description of the property, and a description of his or her ownership interest in the property. *See* §§ 9.3, 9.4.

(3) *Petition for remission involving victims:* The petitioner must show a pecuniary loss arising from the offense underlying the forfeiture, or a related offense. *See* § 9.8(a).

(4) *Petition for expedited release of seized property:* The petitioner must include a complete description of the property and the seizure information, a statement of the petitioner's interest in the property, and a statement of the circumstances justifying expedited release. *See* § 8.19.

(5) *Request for hardship release:* The request must establish, in general, that the claimant has a legitimate interest in the property and that it is not contraband or available for further illegal use. *See* § 8.15.

These statutory and regulatory requirements do not pose identical questions; they provide the guidelines for what information is necessary if an owner or victim chooses to pursue a petition, a claim, or a hardship release.

Moreover, a forfeiture action would fall under one of the three exceptions to the PRA listed in 44 U.S.C. 3518(c)(1), depending on the type of forfeiture proceeding. After property is seized for forfeiture, the Federal seizing agency may commence an administrative forfeiture proceeding against the property by providing notice to the public and any parties with a known ownership interest. An administrative forfeiture would fall within the definition in section 3518(c)(1)(B)(ii) of an "administrative action * * * involving an agency against specific individuals or entities." If a claim is properly filed in the administrative forfeiture, Federal prosecutors must file a civil forfeiture complaint against the property or include it in a criminal indictment within the deadlines laid out by CAFRA or return the property.

A civil forfeiture would fall under the PRA exception of 44 U.S.C. 3518(c)(1)(B)(ii) because it is "a civil action to which the United States * * * is a party." Alternatively, if the prosecutors include the property in a criminal indictment, the criminal forfeiture would occur "during the conduct of a Federal criminal investigation * * * or during the disposition of a particular criminal matter" and would fall under the exception of section 3518(c)(1)(A).

Thus, a claim or petition filed in forfeiture proceedings under the proposed rule is not a collection of information, as defined by the PRA in 44 U.S.C. 3502(3)(A), and would fall within the exceptions of 44 U.S.C. 3518(c)(1).

List of Subjects

21 CFR Part 1316

Administrative practice and procedure, Authority delegations (Government agencies), Drug traffic control, Research, Seizures and forfeitures.

28 CFR Part 8

Administrative practice and procedure, Arms and munitions, communications equipment, copyright, Crime, Gambling, Infants and children, Motor vehicles, Prices, Seizures and forfeitures, Wiretapping and electronic surveillance.

28 CFR Part 9

Administrative practice and procedure, Crime, Seizures and forfeitures.

Accordingly, under the authority of 5 U.S.C. 301 and 28 U.S.C. 509–510, and for the reasons set forth in the preamble, Chapter II of Title 21 and Chapter I of Title 28 of the Code of Federal Regulations are proposed to be amended as follows:

TITLE 21—FOOD AND DRUGS

PART 1316—ADMINISTRATIVE FUNCTIONS, PRACTICES, AND PROCEDURES

Subparts E and F [Removed]

1. Remove subparts E and F.

TITLE 28—JUDICIAL ADMINISTRATION

2. Revise part 8 to read as follow:

PART 8—FORFEITURE AUTHORITY FOR CERTAIN STATUTES

Subpart A—Seizure and Forfeiture of Property

Sec.

Authority: 5 U.S.C. 301; 8 U.S.C. 1103, 1324(b); 18 U.S.C. 981, 983, 3051; 19 U.S.C. 1606, 1607, 1608, 1610, 1612(b), 1613, 1618; 21 U.S.C. 822, 871, 872, 880, 881, 883, 958, 965; 28 U.S.C. 509, 510; Pub. L. 100–690, sec. 6079.

Subpart A—Seizure and Forfeiture of Property

§ 8.1 Scope of regulations.

(a) This part applies to all forfeitures administered by the Department of Justice with the exception of seizures and forfeitures under the statutes listed in 18 U.S.C. 983(i). The authority of seizing agencies to conduct administrative forfeitures derives from the procedural provisions of the Customs laws (19 U.S.C. 1602–1618) where those provisions are incorporated by reference in the substantive forfeiture statutes enforced by the agencies.

(b) The regulations will apply to all forfeiture actions commenced on or after [EFFECTIVE DATE OF FINAL RULE].

§ 8.2 Definitions.

As used in this part, the following terms shall have the meanings specified:

Administrative forfeiture means the process by which property may be forfeited by a seizing agency rather than through a judicial proceeding. Administrative forfeiture has the same meaning as nonjudicial forfeiture, as that term is used in 18 U.S.C. 983.

Appraised value means the estimated market value of property at the time and place of seizure if such or similar property was freely offered for sale by a willing seller to a willing buyer.

Appropriate official means, in the case of the Drug Enforcement Administration (DEA), the Forfeiture Counsel, DEA. In the case of the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF), it means the Associate Chief Counsel, Office of Chief Counsel, ATF. In the case of the Federal Bureau of Investigation (FBI), it means the Unit Chief, Legal Forfeiture Unit, Office of the General Counsel, FBI, except as used in §§ 8.9(a)(2), 8.9(b)(2), 8.10, and 8.15 of this part, where the term *appropriate official* means the office or official identified in the notice published or personal written notice in accordance with § 8.9.

Contraband means—

(1) any controlled substance, hazardous raw material, equipment or container, plants, or other property subject to summary forfeiture pursuant to sections 511(f) or (g) of the Controlled Substances Act (21 U.S.C. 881(f) or (g)); or

(2) any controlled substance imported into the United States, or exported out of the United States, in violation of law.

Civil forfeiture proceeding means a civil judicial forfeiture action as that term is used in 18 U.S.C. 983.

Domestic value means the same as the term *appraised value* as defined in § 8.2(b) of this part.

Expense means all costs incurred to detain, inventory, safeguard, maintain, advertise, sell, or dispose of property seized, detained, or forfeited pursuant to any law.

File or *filed* has the following meanings:

(1) A claim or any other document submitted in an administrative forfeiture proceeding is not deemed filed until actually received by the appropriate official identified in the personal written notice and the published notice specified in § 8.9. It is not considered filed if it is received by any other office or official, such as a court, U.S. Attorney, seizing agent, local ATF or DEA office, or FBI Headquarters. In addition, a claim in an administrative forfeiture proceeding is not considered filed if received only by an electronic or facsimile transmission.

(2) For purposes of computing the start of the 90-day period set forth in 18 U.S.C. 983(a)(3), an administrative forfeiture claim is filed on the date when the claim is received by the designated appropriate official, even if the claim is received from an incarcerated *pro se* prisoner.

Interested party means any person who reasonably appears to have an interest in the property based on the facts known to the seizing agency before a declaration of forfeiture is entered.

Mail includes regular or certified U.S. mail and mail and package transportation and delivery services provided by other private or commercial interstate carriers.

Nonjudicial forfeiture has the same meaning as administrative forfeiture as defined in § 8.2(a).

Person means an individual, partnership, corporation, joint business enterprise, estate, or other legal entity capable of owning property.

Property subject to administrative forfeiture means any personal property of the kinds described in 19 U.S.C. 1607(a)(1)–(4).

Property subject to forfeiture refers to all property that Federal law authorizes to be forfeited to the United States of America in any administrative forfeiture proceeding, in any civil judicial forfeiture proceeding, or in any criminal forfeiture proceeding.

Seizing agency refers to ATF, DEA, or FBI.

§ 8.3 Seizing property subject to forfeiture.

(a) *Authority of seizing agents.* All special agents of any seizing agency may seize assets under any Federal statute over which the agency has investigative and/or forfeiture jurisdiction.

(b) *Turnover of assets seized by state and local agencies.* (1) Property that is seized by a state or local law enforcement agency and transferred to a seizing agency for administrative or civil forfeiture may be adopted for administrative forfeiture without the issuance of any Federal seizure warrant or other Federal judicial process.

(2) Where a state or local law enforcement agency maintains custody of property pursuant to process issued by a state or local judicial authority, and notifies a seizing agency of the impending release of such property, the seizing agency may seek and obtain a Federal seizure warrant in anticipation of a state or local judicial authority releasing the asset from state process for purposes of Federal seizure, and may execute such seizure warrant when the state or local law enforcement agency releases the property as allowed or directed by its judicial authority.

§ 8.4 Inventory.

The seizing agent shall prepare an inventory of any seized property.

§ 8.5 Custody.

(a) All property seized for forfeiture by ATF, DEA, or FBI shall be delivered to the custody of the U.S. Marshals Service (USMS), or a custodian approved by the USMS, as soon as practicable after seizure, unless it is retained as evidence by the seizing agency.

(b) Seized U.S. currency (and, to the extent practicable, seized foreign currency and negotiable instruments) must be deposited promptly in the Seized Asset Deposit Fund pending forfeiture. Provisional exceptions to this requirement may be granted as follows:

(1) If the seized currency has a value less than $5,000 and a supervisory

official within a U.S. Attorney's Office determines in writing that the currency is reasonably likely to serve a significant, independent, tangible evidentiary purpose, or that retention is necessary while the potential evidentiary significance of the currency is being determined by scientific testing or otherwise; or

(2) If the seized currency has a value greater than $5,000 and the Chief of the Asset Forfeiture and Money Laundering Section (AFMLS), Criminal Division, determines in writing that the currency is reasonably likely to serve a significant, independent, tangible evidentiary purpose, or that retention is necessary while the potential evidentiary significance of the currency is being determined by scientific testing or otherwise.

(c) Seized currency has a *significant independent, tangible evidentiary purpose* as those terms are used in §§ 8.5(b)(1) and (2) of this part if, for example, it bears fingerprint evidence, is packaged in an incriminating fashion, or contains a traceable amount of narcotic residue or some other substance of evidentiary significance. If only a portion of the seized currency has evidentiary value, only that portion should be retained; the balance should be deposited.

§ 8.6 Appraisal.

The seizing agency or its designee shall determine the domestic value of seized property as soon as practicable following seizure.

§ 8.7 Release before claim.

(a) After seizure for forfeiture and prior to the filing of any claim, ATF's Chief, Asset Forfeiture and Seized Property Branch, or designee, the appropriate DEA Special Agent in Charge, or designee, or the appropriate FBI Special Agent in Charge, or designee, whichever is applicable, is authorized to release property seized for forfeiture, provided:

(1) The property is not contraband, evidence of a violation of law, or any property, the possession of which by the claimant, petitioner, or the person from whom it was seized is prohibited by state or Federal law, and does not have a design or other characteristic that particularly suits it for use in illegal activities; and

(2) The official designated in paragraph (a) of this section determines within 10 days of seizure that there is an innocent party with the right to immediate possession of the property or that the release would be in the best interest of justice or the Government.

(b) Further, at any time after seizure and before any claim is referred, such seized property may be released if the appropriate official of the seizing agency determines that there is an innocent party with the right to immediate possession of the property or that the release would be in the best interest of justice or the Government.

§ 8.8 Commencing the administrative forfeiture proceeding.

An administrative forfeiture proceeding begins when notice is first published in accordance with § 8.9(a) of this part, or the first personal written notice is sent in accordance with § 8.9(b) of this part, whichever occurs first.

§ 8.9 Notice of administrative forfeiture.

(a) *Notice by publication.* (1) After seizing property subject to administrative forfeiture, the appropriate official of the seizing agency shall select from the following options a means of publication reasonably calculated to notify potential claimants of the seizure and intent to forfeit and sell or otherwise dispose of the property:

(i) Publication once each week for at least three successive weeks in a newspaper generally circulated in the judicial district where the property was seized; or

(ii) Posting a notice on an official government Internet site for at least 30 consecutive days.

(2) The published notice shall:

(i) Describe the seized property;

(ii) State the date, statutory basis, and place of seizure;

(iii) State the deadline for filing a claim when personal written notice has not been received, at least 30 days after the date of final publication of the notice of seizure; and

(iv) State the identity of the appropriate official of the seizing agency and address where the claim must be filed.

(b) *Personal written notice.* (1) *Manner of providing notice.* After seizing property subject to administrative forfeiture, the seizing agency, in addition to publishing notice, shall send personal written notice of the seizure to each interested party in a manner reasonably calculated to reach such parties.

(2) *Content of personal written notice.* The personal written notice sent by the seizing agency shall:

(i) State the date when the personal written notice is sent;

(ii) State the deadline for filing a claim, at least 35 days after the personal written notice is sent;

(iii) State the date, statutory basis, and place of seizure;

(iv) State the identity of the appropriate official of the seizing agency and the address where the claim must be filed; and

(v) Describe the seized property.

(c) *Timing of notice.* (1) *Date of personal notice.* Personal written notice is sent on the date when the seizing agency causes it to be placed in the mail, delivered to a commercial carrier, or otherwise sent by means reasonably calculated to reach the interested party. The personal written notice required by § 8.9(b) of this part shall be sent as soon as practicable, and in no case more than 60 days after the date of seizure (or 90 days after the date of seizure by a state or local law enforcement agency if the property was turned over to a Federal law enforcement agency for the purpose of forfeiture under Federal law).

(2) *Civil judicial forfeiture.* If, before the time period for sending notice expires, the Government files a civil judicial forfeiture action against the seized property and provides notice of such action as required by law, personal notice of administrative forfeiture is not required under paragraph (c)(1) of this section.

(3) *Criminal indictment.* If, before the time period for sending notice under paragraph (c)(1) of this section expires, no civil judicial forfeiture action is filed, but a criminal indictment or information is obtained containing an allegation that the property is subject to forfeiture, the seizing agency shall either:

(i) Send timely personal written notice and continue the administrative forfeiture proceeding; or

(ii) After consulting with the U.S. Attorney, terminate the administrative forfeiture proceeding and notify the custodian to return the property to the person having the right to immediate possession unless the U.S. Attorney takes the steps necessary to maintain custody of the property as provided in the applicable criminal forfeiture statute.

(4) *Subsequent Federal seizure.* If property is seized by a state or local law enforcement agency, but personal written notice is not sent to the person from whom the property is seized within the time period for providing notice under paragraph (c)(1) of this section, then any administrative forfeiture proceeding against the property may commence if:

(i) The property is subsequently seized or restrained by the seizing agency pursuant to a Federal seizure warrant or restraining order and the seizing agency sends notice as soon as

practicable, and in no case more than 60 days after the date of the Federal seizure; or

(ii) The owner of the property consents to forfeiture of the property.

(5) *Tolling.* (i) In states or localities where orders are obtained from a state court authorizing the turnover of seized assets to a Federal seizing agency, the period from the date an application or motion is presented to the state court for the turnover order through the date when such order is issued by the court shall not be included in the time period for providing notice under paragraph (c)(1) of this section.

(ii) If property is detained at an international border or port of entry for the purpose of examination, testing, inspection, obtaining documentation, or other investigation relating to the importation of the property into, or the exportation of the property from, the United States, such period of detention shall not be included in the period described in paragraph (c)(1) of this section. In such cases, the 60-day period shall begin to run when the period of detention ends, if a seizing agency seizes the property for the purpose of forfeiture to the United States.

(6) *Identity of interested party.* If a seizing agency determines the identity or interest of an interested party after the seizure or adoption of the property, but before entering a declaration of forfeiture, the agency shall send written notice to such interested party under paragraph (c)(1) of this section not later than 60 days after determining the identity of the interested party or the interested party's interest.

(7) *Extending deadline for notice.* The appropriate official of the seizing agency may extend the period for sending personal written notice under these regulations in a particular case for a period not to exceed 30 days (which period may not be further extended except by a court pursuant to 18 U.S.C. 983(a)(1)(C) and (D)), if the appropriate official determines, and states in writing, that there is reason to believe that notice may have an adverse result, including: endangering the life or physical safety of an individual; flight from prosecution; destruction of or tampering with evidence; intimidation of potential witnesses; or otherwise seriously jeopardizing an investigation or unduly delaying a trial.

(8) *Certification.* The appropriate official of the seizing agency shall provide the written certification required under 18 U.S.C. 983(a)(1)(C) when the Government requests it and the conditions described in section 983(a)(1)(D) are present.

§ 8.10 Claims.

(a) *Filing.* In order to contest the forfeiture of seized property in Federal court, any person asserting an interest in seized property subject to an administrative forfeiture proceeding under these regulations must file a claim with the appropriate official, after the commencement of the administrative forfeiture proceeding as defined in § 8.8 of this part, and not later than the deadline set forth in a personal notice letter sent pursuant to § 8.9(b) of this part. If personal written notice is sent but not received, then the intended recipient must file a claim with the appropriate official not later than 30 days after the date of the final publication of the notice of seizure.

(b) *Contents of claim.* A claim shall:

(1) Identify the specific property being claimed;

(2) Identify the claimant and state the claimant's interest in the property; and

(3) Be made under oath by the claimant, not counsel for the claimant, and recite that it is made under penalty of perjury, consistent with the requirements of 28 U.S.C. 1746. An acknowledgment, attestation, or certification by a notary public alone is insufficient.

(c) *Availability of claim forms.* The claim need not be made in any particular form. However, each seizing agency conducting forfeitures under these regulations must make claim forms generally available on request. Such forms shall be written in easily understandable language. A request for a claim form does not extend the deadline for filing a claim. Any person may obtain a claim form by requesting one in writing from the appropriate official.

(d) *Cost bond not required.* Any person may file a claim under § 8.10(a) of this part without posting bond, except in forfeitures under statutes listed in 18 U.S.C. 983(i).

(e) *Referral of claim.* Upon receipt of a claim that meets the requirements of § 8.10(a) and (b) of this part, the seizing agency shall return the property or shall suspend the administrative forfeiture proceeding and promptly transmit the claim, together with a description of the property and a complete statement of the facts and circumstances surrounding the seizure, to the appropriate U.S. Attorney for commencement of judicial forfeiture proceeding. Upon making the determination that the seized property will be released, the agency shall promptly notify the person with a right to immediate possession of the property, informing that person to contact the property custodian within a specified period for release of the property, and further informing that person that failure to contact the property custodian within the specified period for release of the property will result in abandonment of the property pursuant to applicable regulations. The seizing agency shall notify the property custodian of the identity of the person to whom the property should be released. The property custodian shall have the right to require presentation of proper identification or to take other steps to verify the identity of the person who seeks the release of property, or both.

(f) *Premature filing.* If a claim is filed with the appropriate official after the seizure of property, but before the commencement of the administrative forfeiture proceeding as defined in § 8.8 of this part, the claim shall be deemed filed on the 30th day after the commencement of the administrative forfeiture proceeding. If such claim meets the requirements of § 8.10(b) of this part, the seizing agency shall suspend the administrative forfeiture proceedings and promptly transmit the claim, together with a description of the property and a complete statement of the facts and circumstances surrounding the seizure to the appropriate U.S. Attorney for commencement of judicial forfeiture proceedings.

(g) *Defective claims.* If the seizing agency determines that an otherwise timely claim does not meet the requirements of § 8.10(b) of this part, the seizing agency may notify the claimant of this determination and allow the claimant a reasonable time to cure the defect(s) in the claim. If, within the time allowed by the seizing agency, the requirements of § 8.10(b) of this part are not met, the claim shall be void and the forfeiture proceedings shall proceed as if no claim had been submitted. If the claimant timely cures the deficiency, then the claim shall be deemed filed on the date when the appropriate official receives the cured claim.

§ 8.11 Interplay of administrative and criminal judicial forfeiture proceedings.

An administrative forfeiture proceeding pending against seized or restrained property does not bar the Government from alleging that the same property is forfeitable in a criminal case. Notwithstanding the fact that an allegation of forfeiture has been included in a criminal indictment or information, the property may be administratively forfeited in a parallel proceeding.

§ 8.12 Declaration of administrative forfeiture.

If the seizing agency commences a timely proceeding against property

subject to administrative forfeiture, and no valid and timely claim is filed, the appropriate official of the seizing agency shall declare the property forfeited. The declaration of forfeiture shall have the same force and effect as a final decree and order of forfeiture in a Federal judicial forfeiture proceeding.

§ 8.13 Return of property.

(a) If, under 18 U.S.C. 983(a)(3), the United States is required to return seized property, the U.S. Attorney in charge of the matter shall immediately notify the appropriate seizing agency that the 90-day deadline was not met. Under this subsection, the United States is not required to return property for which it has an independent basis for continued custody, including but not limited to contraband or evidence of a violation of law.

(b) Upon becoming aware that the seized property must be released, the agency shall promptly notify the person with a right to immediate possession of the property, informing that person to contact the property custodian within a specified period for release of the property, and further informing that person that failure to contact the property custodian within the specified period for release of the property may result in initiation of abandonment proceedings against the property pursuant to 41 CFR part 128–48. The seizing agency shall notify the property custodian of the identity of the person to whom the property should be released.

(c) The property custodian shall have the right to require presentation of proper identification and to verify the identity of the person who seeks the release of property.

§ 8.14 Disposition of property before forfeiture.

(a) Whenever it appears to the seizing agency that any seized property is liable to perish or to waste, or to be greatly reduced in value during its detention for forfeiture, or that the expense of keeping the property is or will be disproportionate to its value, the appropriate official of the seizing agency may order destruction, sale, or other disposition of such property prior to forfeiture. In addition, the owner may obtain release of the property by posting a substitute monetary amount with the seizing agency to be held subject to forfeiture proceedings in place of the seized property to be released. Upon approval by the appropriate official of the seizing agency, the property will be released to the owner after the payment of an amount equal to the government appraised value of the property if the property is not evidence of a violation of law, is not contraband, and has no design or other characteristics that particularly suit it for use in illegal activities. This payment must be in the form of a money order, an official bank check, or a cashier's check made payable to the United States Marshals Service. A bond in the form of a cashier's check or official bank check will be considered as paid once the check has been accepted for payment by the financial institution that issued the check. If a substitute amount is posted and the property is administratively forfeited, the seizing agency will forfeit the substitute amount in lieu of the property. The pre-forfeiture destruction, sale, or other disposition of seized property pursuant to this section shall not extinguish any person's rights to the value of the property under applicable law. The authority vested in the appropriate official under this subsection may not be delegated.

(b) The seizing agency shall commence forfeiture proceedings, regardless of the disposition of the property under § 8.14(a) of this part. A person with an interest in the property that was destroyed or otherwise disposed of under § 8.14(a) of this part may file a claim to contest the forfeiture of the property or a petition for remission or mitigation of the forfeiture. No government agent or employee shall be liable for the destruction or other disposition of property made pursuant to § 8.14(a) of this part. The destruction or other disposition of the property pursuant to this section does not impair *in rem* jurisdiction.

§ 8.15 Requests for hardship release of seized property.

(a) Under certain circumstances a claimant may be entitled to immediate release of seized property on the basis of hardship.

(b) Any person filing a request for hardship release must also file a claim to the seized property pursuant to § 8.10 of this part and as defined in 18 U.S.C. 983(a).

(c) The timely filing of a valid claim pursuant to § 8.10 of this part does not entitle claimant to possession of the seized property, but a claimant may request immediate release of the property while the forfeiture is pending, based on hardship.

(d) A claimant seeking hardship release of property under 18 U.S.C. 983(f) and these regulations must file a written request with the appropriate official. The request must establish that:

(1) The claimant has a possessory interest in the property;

(2) The claimant has sufficient ties to the community to provide assurance that the property will be available at the time of trial;

(3) The continued possession by the Government pending the final disposition of forfeiture proceedings will cause substantial hardship to the claimant, such as preventing the functioning of a business, preventing an individual from working, or leaving an individual homeless;

(4) The claimant's likely hardship from the continued possession by the Government of the seized property outweighs the risk that the property will be destroyed, damaged, lost, concealed, or transferred if it is returned to the claimant during the pendency of the proceeding; and

(5) The seized property is not:

(i) Contraband, any property, the possession of which by the claimant, petitioner, or the person from whom it was seized is prohibited by state or Federal law, currency, or other monetary instrument, or electronic funds unless such currency or other monetary instrument or electronic funds constitutes the assets of a legitimate business which has been seized;

(ii) Intended to be used as evidence of a violation of law;

(iii) By reason of design or other characteristic, particularly suited for use in illegal activities; or

(iv) Likely to be used to commit additional criminal acts if returned to the claimant.

(e) A hardship release request pursuant to this section shall be deemed to have been made on the date when it is received by the appropriate official as defined in § 8.2(c) of this part or the date the claim was deemed filed under § 8.10(f) of this part. If the request is ruled on and denied by the appropriate official or the property has not been released within the 15-day time period, the claimant may file a petition in Federal district court pursuant to 18 U.S.C. 983(f)(3). If a petition is filed in Federal district court, the claimant must send a copy of the petition to the agency to which the hardship petition was originally submitted and to the U.S. Attorney in the judicial district in which the judicial petition was filed.

(f) If a civil forfeiture complaint is filed on the property and the claimant files a claim with the court pursuant to 18 U.S.C. 983(a)(4)(A) and Rule G(5) of the Supplemental Rules for Certain Admiralty and Maritime Claims, a hardship petition may be submitted to the individual identified in the public or personal notice of the civil judicial forfeiture action.

§ 8.16 Attorney fees and costs.

The United States is not liable for attorney fees or costs in any administrative forfeiture proceeding, including such proceedings in which a claim is filed, the matter is referred to the U.S. Attorney, and the U.S. Attorney declines to commence judicial forfeiture proceedings.

Subpart B—Expedited Forfeiture Proceedings for Property Seizures Based on Violations Involving the Possession of Personal Use Quantities of a Controlled Substance

§ 8.17 Purpose and scope.

(a) The following definitions, regulations, and criteria are designed to establish and implement procedures required by section 6079 of the Anti-Drug Abuse Act of 1988, Public Law 100–690, 102 Stat. 4181. They are intended to supplement existing law and procedures relative to the forfeiture of property under the identified statutory authority. These regulations do not affect the existing legal and equitable rights and remedies of those with an interest in property seized for forfeiture, nor do these provisions relieve interested parties from their existing obligations and responsibilities in pursuing their interests through such courses of action. These regulations are intended to reflect the intent of Congress to minimize the adverse impact on those entitled to legal or equitable relief occasioned by the prolonged detention of property subject to forfeiture due to violations of law involving personal use quantities of controlled substances. The definition of *personal use quantities* of a controlled substance as contained herein is intended to distinguish between those small quantities that are generally considered to be possessed for personal consumption and not for further distribution, and those larger quantities generally considered to be intended for further distribution.

(b) In this regard, for violations involving the possession of personal use quantities of a controlled substance, section 6079(b)(2) requires either that administrative forfeiture be completed within 21 days of the seizure of the property, or alternatively, that procedures be established that provide a means by which an individual entitled to relief may initiate an expedited administrative review of the legal and factual basis of the seizure for forfeiture. Should an individual request relief pursuant to these regulations and be entitled to the return of the seized property, such property shall be returned immediately following that determination, and in no event later than 20 days after the filing of a petition for expedited release by an owner, and the administrative forfeiture process shall cease. Should the individual not be entitled to the return of the seized property, however, the administrative forfeiture of that property shall proceed. The owner may, in any event, obtain release of property pending the administrative forfeiture by submitting to the agency making the determination property sufficient to preserve the Government's vested interest for purposes of the administrative forfeiture.

§ 8.18 Definitions.

As used in this subpart, the following terms shall have the meanings specified:

Commercial fishing industry vessel means a vessel that:

(1) Commercially engages in the catching, taking, or harvesting of fish or an activity that can reasonably be expected to result in the catching, taking, or harvesting of fish;

(2) Commercially prepares fish or fish products other than by gutting, decapitating, gilling, skinning, shucking, icing, freezing, or brine chilling; or

(3) Commercially supplies, stores, refrigerates, or transports fish, fish products, or materials directly related to fishing or the preparation of fish to or from a fishing, fish processing, or fish tender vessel or fish processing facility.

Controlled substance has the meaning given in 21 U.S.C. 802(6).

Normal and customary manner means that inquiry suggested by particular facts and circumstances that would customarily be undertaken by a reasonably prudent individual in a like or similar situation. Actual knowledge of such facts and circumstances is unnecessary, and implied, imputed, or constructive knowledge is sufficient. An established norm, standard, or custom is persuasive but not conclusive or controlling in determining whether an owner acted in a normal and customary manner to ascertain how property would be used by another legally in possession of the property. The failure to act in a normal and customary manner as defined herein will result in the denial of a petition for expedited release of the property and is intended to have the desirable effect of inducing owners of the property to exercise greater care in transferring possession of their property. *Owner* means one having a legal and possessory interest in the property seized for forfeiture. Even though one may hold primary and direct title to the property seized, such person may not have sufficient actual beneficial interest in the property to support a petition as owner if the facts indicate that another person had dominion and control over the property.

Personal use quantities means those amounts of controlled substances in possession in circumstances where there is no other evidence of an intent to distribute, or to facilitate the manufacturing, compounding, processing, delivering, importing, or exporting of any controlled substance.

(1) Evidence that possession of quantities of a controlled substance is for other than personal use may include, for example:

(i) Evidence, such as drug scales, drug distribution paraphernalia, drug records, drug packaging material, method of drug packaging, drug "cutting" agents and other equipment, that indicates an intent to process, package or distribute a controlled substance;

(ii) Information from reliable sources indicating possession of a controlled substance with intent to distribute;

(iii) The arrest or conviction record of the person or persons in actual or constructive possession of the controlled substance for offenses under Federal, state or local law that indicates an intent to distribute a controlled substance;

(iv) Circumstances or reliable information indicating that the controlled substance is related to large amounts of cash or any amount of prerecorded government funds;

(v) Circumstances or reliable information indicating that the controlled substance is a sample intended for distribution in anticipation of a transaction involving large quantities, or is part of a larger delivery;

(vi) Statements by the possessor, or otherwise attributable to the possessor, including statements of conspirators, that indicate possession with intent to distribute; or

(vii) The fact that the controlled substance was recovered from sweepings.

(2) Possession of a controlled substance shall be presumed to be for personal use when there are no indicia of illicit drug trafficking or distribution—such as, but not limited to, the factors listed above—and the amounts do not exceed the following quantities:

(i) One gram of a mixture or substance containing a detectable amount of heroin;

(ii) One gram of a mixture or substance containing a detectable amount of—

(A) Coca leaves, except coca leaves and extracts of coca leaves from which

cocaine, ecgonine, and derivations of ecgonine or their salts have been removed;

(B) Cocaine, its salts, optical and geometric isomers, and salts of isomers;

(C) Ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(D) Any compound, mixture, or preparation that contains any quantity of any of the substances referred to in paragraphs (2)(ii)(A) through (C) of this definition;

(iii) 1/10th gram of a mixture or substance described in paragraph (e)(2)(ii) of this section which contains cocaine base;

(iv) 1/10th gram of a mixture or substance containing a detectable amount of phencyclidine (PCP);

(v) 500 micrograms of lysergic acid diethylamide (LSD);

(vi) One ounce of a mixture or substance containing a detectable amount of marihuana;

(vii) One gram of methamphetamine, its salts, isomers, and salts of its isomers, or one gram of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers.

(3) The possession of a narcotic, a depressant, a stimulant, a hallucinogen, or a cannabis-controlled substance will be considered in excess of personal use quantities if the dosage unit amount possessed provides the same or greater equivalent efficacy as the quantities described in paragraph (e)(2) of this section.

Property means property subject to forfeiture under 21 U.S.C. 881(a)(4), (6), and (7); 19 U.S.C. 1595a; and 49 U.S.C. 80303.

Seizing agency means the Federal agency that has seized the property or adopted the seizure of another agency and has the responsibility for administratively forfeiting the property;

Statutory rights or defenses to the forfeiture means all legal and equitable rights and remedies available to a claimant of property seized for forfeiture.

§ 8.19 Petition for expedited release in an administrative forfeiture proceeding.

(a) Where property is seized for administrative forfeiture involving controlled substances in personal use quantities the owner may petition the seizing agency for expedited release of the property.

(b) Where property described in § 8.19(a) of this part is a commercial fishing industry vessel proceeding to or from a fishing area or intermediate port of call or actually engaged in fishing operations, which would be subject to seizure for administrative forfeiture for a violation of law involving controlled substances in personal use quantities, a summons to appear shall be issued in lieu of a physical seizure. The vessel shall report to the port designated in the summons. The seizing agency shall be authorized to effect administrative forfeiture as if the vessel had been physically seized. Upon answering the summons to appear on or prior to the last reporting date specified in the summons, the owner of the vessel may file a petition for expedited release pursuant to § 8.19(a) of this part, and the provisions of § 8.19(a) of this part and other provisions in this section pertaining to a petition for expedited release shall apply as if the vessel had been physically seized.

(c) The owner filing the petition for expedited release shall establish the following:

(1) The owner has a valid, good faith interest in the seized property as owner or otherwise;

(2) The owner reasonably attempted to ascertain the use of the property in a normal and customary manner; and

(3) The owner did not know of or consent to the illegal use of the property, or in the event that the owner knew or should have known of the illegal use, the owner did what reasonably could be expected to prevent the violation.

(d) In addition to those factors listed in § 8.19(c) of this part, if an owner can demonstrate that the owner has other statutory rights or defenses that would cause the owner to prevail on the issue of forfeiture, such factors shall also be considered in ruling on the petition for expedited release.

(e) A petition for expedited release must be received by the appropriate seizing agency within 20 days from the date of the first publication of the notice of seizure in order to be considered by the seizing agency. The petition must be executed and sworn to by the owner and both the envelope and the request must be clearly marked "PETITION FOR EXPEDITED RELEASE." Such petition shall be filed with the appropriate office or official identified in the personal written notice and the publication notice.

(f) The petition shall include the following:

(1) A complete description of the property, including identification numbers, if any, and the date and place of seizure;

(2) The petitioner's interest in the property, which shall be supported by title documentation, bills of sale, contracts, mortgages, or other satisfactory documentary evidence; and

(3) A statement of the facts and circumstances, to be established by satisfactory proof, relied upon by the petitioner to justify expedited release of the seized property.

§ 8.20 Ruling on petition for expedited release in an administrative forfeiture proceeding.

(a) If a final administrative determination of the case, without regard to the provisions of this section, is made within 21 days of the seizure, the seizing agency need take no further action under this section on a petition for expedited release received pursuant to § 8.19(a) of this part.

(b) If no such final administrative determination is made within 21 days of the seizure, the following procedure shall apply. The seizing agency shall, within 20 days after the receipt of the petition for expedited release, determine whether the petition filed by the owner has established the factors listed in § 8.19(c) of this part and:

(1) If the seizing agency determines that those factors have been established, it shall terminate the administrative proceedings and return the property to the owner (or in the case of a commercial fishing industry vessel for which a summons has been issued shall dismiss the summons), except where it is evidence of a violation of law; or

(2) If the seizing agency determines that those factors have not been established, the agency shall proceed with the administrative forfeiture.

§ 8.21 Posting of substitute monetary amount in an administrative forfeiture proceeding.

(a) Where property is seized for administrative forfeiture involving controlled substances in personal use quantities, the owner may obtain release of the property by posting a substitute monetary amount with the seizing agency to be held subject to forfeiture proceedings in place of the seized property to be released. The property will be released to the owner upon the payment of an amount equal to the government appraised value of the property if the property is not evidence of a violation of law and has no design or other characteristics that particularly suit it for use in illegal activities. This payment must be in the form of a traveler's check, a money order, a cashier's check, or an irrevocable letter of credit made payable to the seizing agency. A bond in the form of a cashier's check will be considered as paid once the check has been accepted for payment by the financial institution which issued the check.

(b) If a substitute amount is posted and the property is administratively

forfeited, the seizing agency will forfeit the substitute amount in lieu of the property.

§ 8.22 Special notice provision.

At the time of seizure of property defined in § 8.18 of this part for violations involving the possession of personal use quantities of a controlled substance, the seizing agency must provide written notice to the possessor of the property specifying the procedures for the filing of a petition for expedited release and for the posting of a substitute monetary bond as set forth in section 6079 of the Anti-Drug Abuse Act of 1988 and implementing regulations.

Subpart C—Other Applicable Provisions

§ 8.23 Re-delegation of authority.

(a) *Re-delegation of authority permitted.* (1) The powers and responsibilities delegated to the DEA Forfeiture Counsel by this regulation may be re-delegated to attorneys working under the direct supervision of the DEA Forfeiture Counsel.

(2) The powers and responsibilities delegated to the FBI Unit Chief, Legal Forfeiture Unit, by this regulation may be re-delegated to the attorneys working under the direct supervision of the FBI Unit Chief, Legal Forfeiture Unit.

(3) The powers and responsibilities delegated to the Associate Chief Counsel, Office of Chief Counsel, ATF may be re-delegated to the attorneys working under the direct supervision of the Associate Chief Counsel, Office of Chief Counsel, ATF.

(b) *Re-delegation of authority not permitted.* (1) The powers and responsibilities delegated to the DEA Forfeiture Counsel, the FBI Unit Chief, Legal Forfeiture Unit, and the ATF Associate Chief Counsel, Office of Chief Counsel to make decisions regarding the disposition of property before forfeiture pursuant to § 8.14 of this part may not be re-delegated.

(2) The powers and responsibilities delegated to the DEA Forfeiture Counsel, the FBI Unit Chief, Legal Forfeiture Unit, and the ATF Associate Chief Counsel, Office of Chief Counsel to make decisions regarding the delay of notice of forfeiture pursuant to §§ 8.9(c)(7) and (8) of this part and 18 U.S.C. 983(a)(1)(B)–(C) may not be re-delegated.

3. Revise part 9 to read as follows:

PART 9—REGULATIONS GOVERNING THE REMISSION OR MITIGATION OF ADMINISTRATIVE, CIVIL, AND CRIMINAL FORFEITURES

Sec.

Authority: 5 U.S.C. 301; 8 U.S.C. 1103, 1324(b); 18 U.S.C. 981, 983, 3051; 19 U.S.C. 1606, 1607, 1608, 1610, 1612(b), 1613, 1618; 21 U.S.C. 822, 871, 872, 880, 881, 883, 958, 965; 28 U.S.C. 509, 510; Pub. L. 100–690, sec. 6079.

§ 9.1 Purpose, authority, and scope.

(a) *Purpose.* This part sets forth the procedures for agency officials to follow when considering remission or mitigation of administrative forfeitures under the jurisdiction of the agency, and civil judicial and criminal judicial forfeitures under the jurisdiction of the Department of Justice's Criminal Division. The purpose of this part is to provide a basis for the partial or total remission of forfeiture for individuals who have an interest in the forfeited property but who did not participate in, or have knowledge of, the conduct that resulted in the property being subject to forfeiture and, where required, took all reasonable steps under the circumstances to ensure that such property would not be used, acquired, or disposed of contrary to law. Additionally, the regulations provide for partial or total mitigation of the forfeiture and imposition of alternative conditions in appropriate circumstances.

(b) *Authority to grant remission and mitigation.* (1) Remission and mitigation functions in administrative forfeitures are performed by the agency seizing the property. Within the Federal Bureau of Investigation (FBI), authority to grant remission and mitigation is delegated to the Forfeiture Counsel, who is the Unit Chief, Legal Forfeiture Unit, Office of the General Counsel; within the Drug Enforcement Administration (DEA), authority to grant remission and mitigation is delegated to the Forfeiture Counsel, Office of Chief Counsel; and within the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF), authority to grant remission and mitigation is delegated to the Associate Chief Counsel, Office of Chief Counsel.

(2) Remission and mitigation functions in judicial cases are performed by the Criminal Division of the Department of Justice. Within the Criminal Division, authority to grant remission and mitigation is delegated to the Chief, Asset Forfeiture and Money Laundering Section.

(3) The powers and responsibilities delegated by this part may be re-delegated to attorneys or managers working under the supervision of the designated officials.

(c) *Scope.* This part governs any petition for remission filed with the Attorney General and supersedes any Department of Justice regulation governing petitions for remission, to the extent such regulation is inconsistent with this part.

(d) The time periods and internal requirements established in this part are designed to guide the orderly administration of the remission and mitigation process and are not intended to create rights or entitlements in favor of individuals seeking remission or mitigation. This part applies to all forfeiture actions commenced on or after [EFFECTIVE DATE OF FINAL RULE].

§ 9.2 Definitions.

As used in this part:

Administrative forfeiture means the process by which property may be forfeited by a seizing agency rather than through judicial proceedings. *Administrative forfeiture* has the same meaning as nonjudicial forfeiture, as that term is used in 18 U.S.C. 983.

Appraised value means the estimated market value of property at the time and place of seizure if such or similar property were freely offered for sale between a willing seller and a willing buyer.

Assets Forfeiture Fund means the Department of Justice Assets Forfeiture Fund or Department of the Treasury Forfeiture Fund, depending upon the identity of the seizing agency.

Attorney General means the Attorney General of the United States or his or her designee.

Beneficial owner means a person with actual use of, as well as an interest in, the property subject to forfeiture.

Chief, Asset Forfeiture and Money Laundering Section, and *Chief,* refer to the Chief of the Asset Forfeiture and Money Laundering Section, Criminal Division, United States Department of Justice.

General creditor means one whose claim or debt is not secured by a specific right to obtain satisfaction against the particular property subject to forfeiture.

Judgment creditor means one who has obtained a judgment against the debtor but has not yet received full satisfaction of the judgment.

Judicial forfeiture means either a civil or a criminal proceeding in a United States District Court that may result in a final judgment and order of forfeiture.

Lienholder means a creditor whose claim or debt is secured by a specific right to obtain satisfaction against the particular property subject to forfeiture. A lien creditor qualifies as a lienholder if the lien:

(1) Was established by operation of law or contract;

(2) Was created as a result of an exchange of money, goods, or services; and

(3) Is perfected against the specific property forfeited for which remission or mitigation is sought (*e.g.,* a real estate mortgage; a mechanic's lien).

Net equity means the amount of a lienholder's monetary interest in property subject to forfeiture. Net equity shall be computed by determining the amount of unpaid principal and unpaid interest at the time of seizure and by adding to that sum unpaid interest calculated from the date of seizure through the last full month prior to the date of the decision on the petition. Where a rate of interest is set forth in a security agreement, the rate of interest to be used in this computation will be the annual percentage rate so specified in the security agreement that is the basis of the lienholder's interest. In this computation, however, there shall be no allowances for attorney fees, accelerated or enhanced interest charges, amounts set by contract as damages, unearned extended warranty fees, insurance, service contract charges incurred after the date of seizure, allowances for dealer's reserve, or any other similar charges.

Nonjudicial forfeiture has the same meaning as *administrative forfeiture* as defined in this section.

Owner means the person in whom primary title is vested or whose interest is manifested by the actual and beneficial use of the property, even though the title is vested in another. A *victim* of an offense, as defined in this section, may also be an owner if he or she has a present legally cognizable ownership interest in the property forfeited. A nominal owner of property will not be treated as its true owner if he or she is not its beneficial owner.

Person means an individual, partnership, corporation, joint business enterprise, estate, or other legal entity capable of owning property.

Petition means a petition for remission or mitigation of forfeiture under the regulations in this part. This definition includes a petition for restoration of the proceeds of sale of forfeited property and a petition for the value of forfeited property placed into official use.

Petitioner means the person applying for remission, mitigation, or restoration of the proceeds of sale, or for the appraised value of forfeited property, under this part. A petitioner may be an *owner* as defined in this section, a *lienholder* as defined in this section, or a *victim* as defined in this section, subject to the limitations of § 9.8.

Property means real or personal property of any kind capable of being owned or possessed.

Record means a series of arrests for related crimes, unless the arrestee was acquitted or the charges were dismissed for lack of evidence, a conviction for a related crime or completion of sentence within ten years of the acquisition of the property subject to forfeiture, or two convictions for a related crime at any time in the past.

Related crime as defined in this section and used in § 9.6(e) means any crime similar in nature to that which gives rise to the seizure of property for forfeiture. For example, where property is seized for a violation of the Federal laws relating to drugs, a related crime would be any offense involving a violation of the Federal laws relating to drugs or the laws of any state or political subdivision thereof relating to drugs.

Related offense as used in § 9.8 means:

(1) Any predicate offense charged in a Federal Racketeer Influenced and Corrupt Organizations Act (RICO) count for which forfeiture was ordered; or

(2) An offense committed as part of the same scheme or design, or pursuant to the same conspiracy, as was involved in the offense for which forfeiture was ordered.

Ruling official means any official to whom decision making authority has been delegated pursuant to § 9.1(b).

Seizing agency means the Federal agency that seized the property or adopted the seizure of another agency for Federal forfeiture.

Victim means a person who has incurred a pecuniary loss as a direct result of the commission of the offense underlying a forfeiture. A drug user is not considered a victim of a drug trafficking offense under this definition. A victim does not include one who acquires a right to sue the perpetrator of the criminal offense for any loss by assignment, subrogation, inheritance, or otherwise from the actual victim, unless that person has acquired an actual ownership interest in the forfeited property; provided however, that if a victim has received compensation from insurance or any other source with respect to a pecuniary loss, remission may be granted to the third party who provided the compensation, up to the amount of the victim's pecuniary loss as defined in § 9.8(c).

Violator means the person whose use or acquisition of the property in violation of the law subjected such property to seizure for forfeiture.

§ 9.3 Petitions in administrative forfeiture cases.

(a) *Notice of seizure.* The notice of seizure and intent to forfeit the property shall advise any persons who may have a present ownership interest in the property to submit their petitions for remission or mitigation within 30 days of the date they receive the notice in order to facilitate processing. Petitions shall be considered any time after notice until the property has been forfeited, except in cases involving petitions to restore the proceeds from the sale of forfeited property. A notice of seizure shall include the title of the seizing agency, the ruling official, the mailing and street address of the official to whom petitions should be sent, and an asset identifier number.

(b) *Persons who may file.* (1) A petition for remission or mitigation must be filed by a petitioner as defined in § 9.2 of this part or as prescribed in § 9.9(g) and (h) of this part. A person or person on their behalf may not file a petition if, after notice or knowledge of the fact that a warrant or process has been issued for his apprehension, in order to avoid criminal prosecution, the person:

(i) Purposely leaves the jurisdiction of the United States;

(ii) Declines to enter or reenter the United States to submit to its jurisdiction; or

(iii) Otherwise evades the jurisdiction of the court in which a criminal matter is pending against the person.

(2) Section 9.3(b)(1) of this part applies to a petition filed by a corporation if any majority shareholder, or individual filing the claim on behalf of the corporation:

(i) Purposely leaves the jurisdiction of the United States;

(ii) Declines to enter or reenter the United States to submit to its jurisdiction; or

(iii) Otherwise evades the jurisdiction of the court in which a criminal matter is pending against the person.

(c) *Contents of petition.* (1) All petitions must include the following information in clear and concise terms:

(i) The name, address, and social security or other taxpayer identification number of the person claiming an interest in the seized property who is seeking remission or mitigation;

(ii) The name of the seizing agency, the asset identifier number, and the date and place of seizure;

(iii) A complete description of the property, including make, model, and serial numbers, if any; and

(iv) A description of the petitioner's interest in the property as owner, lienholder, or otherwise, supported by original or certified bills of sale, contracts, deeds, mortgages, or other documentary evidence. Such documentation includes evidence establishing the source of funds for seized currency or the source of funds used to purchase the seized asset.

(2) Any factual recitation or documentation of any type in a petition must be supported by a declaration under penalty of perjury that meets the requirements of 28 U.S.C. 1746.

(d) *Releases.* In addition to the contents of the petition for remission or mitigation set forth in § 9.3(c) of this part, upon request of the agency, the petitioner shall also furnish the agency with an instrument executed by the titled or registered owner and any other known claimant of an interest in the property releasing interest in such property.

(e) *Filing petition with agency.* (1) A petition for remission or mitigation subject to administrative forfeiture is to be sent to the official address provided in the notice of seizure and shall be sworn to by the petitioner or by the petitioner's attorney upon information and belief, supported by the client's sworn notice of representation pursuant to 28 U.S.C. 1746, as set out in § 9.9(g) of this part.

(2) If the notice of seizure does not provide an official address, the petition shall be addressed to the appropriate Federal agency as follows:

(i)(A) DEA: All submissions must be filed with the Forfeiture Counsel, Asset Forfeiture Section, Office of Chief Counsel, Drug Enforcement Administration, HQS Forfeiture Response, P.O. Box 1475, Quantico, Virginia 22134–1475.

(B) Correspondence via private delivery must be filed with the Forfeiture Counsel, Asset Forfeiture Section (CCF), Office of Chief Counsel, Drug Enforcement Administration, 8701 Morrissette Drive, Springfield, Virginia 22152.

(C) Submission by facsimile or other electronic means will not be accepted.

(ii)(A) FBI: All submissions must be filed with the FBI Special Agent in Charge at the Field Office that seized the property.

(B) Submission by facsimile or other electronic means will not be accepted.

(iii)(A) ATF: All submissions must be filed with the Office of Chief Counsel, Attention: Forfeiture Counsel, 99 New York Avenue, NE, Washington, DC 20226.

(B) Submission by facsimile or other electronic means will not be accepted.

(f) *Agency investigation.* Upon receipt of a petition, the seizing agency shall investigate the merits of the petition and may prepare a written report containing the results of that investigation. This report shall be submitted to the ruling official for review and consideration.

(g) *Ruling.* Upon receipt of the petition and the agency report, the ruling official for the seizing agency shall review the petition and the report, if any, and shall rule on the merits of the petition. No hearing shall be held.

(h) *Petitions granted.* If the ruling official grants a remission or mitigation of the forfeiture, a copy of the decision shall be mailed to the petitioner or, if represented by an attorney, to the petitioner's attorney. A copy shall also be sent to the United States Marshals Service (USMS) or other property custodian. The written decision shall include the terms and conditions, if any, upon which the remission or mitigation is granted and the procedures the petitioner must follow to obtain release of the property or the monetary interest therein.

(i) *Petitions denied.* If the ruling official denies a petition, a copy of the decision shall be mailed to the petitioner or, if represented by an attorney, to the petitioner's attorney of record. A copy of the decision shall also be sent to the USMS or other property custodian. The decision shall specify the reason that the petition was denied. The decision shall advise the petitioner that a request for reconsideration of the denial of the petition may be submitted to the ruling official in accordance with § 9.3(j) of this part.

(j) *Request for reconsideration.* (1) A request for reconsideration of the denial of the petition shall be considered if:

(i) It is postmarked or received by the office of the ruling official within 10 days from the receipt of the notice of denial of the petition by the petitioner; and

(ii) The request is based on information or evidence not previously considered that is material to the basis for the denial or presents a basis clearly demonstrating that the denial was erroneous.

(2) In no event shall a request for reconsideration be decided by the same ruling official who ruled on the original petition.

(3) Only one request for reconsideration of a denial of a petition shall be considered.

(k) *Restoration of proceeds from sale.* (1) A petition for restoration of the proceeds from the sale of forfeited property, or for the appraised value of forfeited property when the forfeited property has been retained by or delivered to a government agency for official use, may be submitted by an owner or lienholder in cases in which the petitioner:

(i) Did not know of the seizure prior to the entry of a declaration of forfeiture; and

(ii) Could not reasonably have known of the seizure prior to the entry of a declaration of forfeiture.

(2) Such a petition shall be submitted pursuant to § 9.3(b) through (e) of this part within 90 days of the date the property is sold or otherwise disposed of.

§ 9.4 Petitions in judicial forfeiture cases.

(a) *Notice of seizure.* The notice of seizure and intent to forfeit the property shall advise any persons who may have a present ownership interest in the property to submit their petitions for remission or mitigation within 30 days of the date they receive the notice in order to facilitate processing. Petitions shall be considered any time after notice until such time as the forfeited property is placed in official use, sold, or otherwise disposed of according to law, except in cases involving petitions to restore property. A notice of seizure shall include the title of the ruling official and the mailing and street address of the official to whom petitions should be sent, the name of the agency seizing the property, an asset identifier number, and the district court docket number.

(b) *Persons who may file.* A petition for remission or mitigation must be filed by a petitioner as defined in § 9.2(p) of this part or as prescribed in § 9.9(g) and (h) of this part.

(c) *Contents of petition.* (1) All petitions must include the following information in clear and concise terms:

(i) The name, address, and social security or other taxpayer identification number of the person claiming an interest in the seized property who is seeking remission or mitigation;

(ii) The name of the seizing agency, the asset identifier number, and the date and place of seizure;

(iii) The district court docket number;

(iv) A complete description of the property, including the address or legal description of real property, and make,

model, and serial numbers of personal property, if any; and

(v) A description of the petitioner's interest in the property as owner, lienholder, or otherwise, supported by original or certified bills of sale, contracts, mortgages, deeds, or other documentary evidence.

(2) Any factual recitation or documentation of any type in a petition must be supported by a declaration under penalty of perjury that meets the requirements of 28 U.S.C. 1746.

(d) *Releases.* In addition to the content of the petition for remission or mitigation set forth in § 9.4(c) of this part, the petitioner, upon request, also shall furnish the agency with an instrument executed by the titled or registered owner and any other known claimant of an interest in the property releasing the interest in such property.

(e) *Filing petition with Department of Justice.* A petition for remission or mitigation of a judicial forfeiture shall be addressed to the Attorney General; shall be sworn to by the petitioner or by the petitioner's attorney upon information and belief, supported by the client's sworn notice of representation pursuant to 28 U.S.C. 1746, as set forth in § 9.9(g) of this part; and shall be submitted to the U.S. Attorney for the district in which the judicial forfeiture proceedings are brought.

(f) *Agency investigation and recommendation; U.S. Attorney's recommendation.* Upon receipt of a petition, the U.S. Attorney shall direct the seizing agency to investigate the merits of the petition based on the information provided by the petitioner and the totality of the agency's investigation of the underlying basis for forfeiture. The agency shall submit to the U.S. Attorney a report of its investigation and its recommendation on whether the petition should be granted or denied. Upon receipt of the agency's report and recommendation, the U.S. Attorney shall forward to the Chief, Asset Forfeiture and Money Laundering Section, the petition, the seizing agency's report and recommendation, and the U.S. Attorney's recommendation on whether the petition should be granted or denied.

(g) *Ruling.* The Chief shall rule on the petition. No hearing shall be held. The Chief shall not rule on any petition for remission if such remission was previously denied by the agency pursuant to § 9.3 of this part.

(h) *Petitions under Internal Revenue Service liquor laws.* The Chief shall accept and consider petitions submitted in judicial forfeiture proceedings under the Internal Revenue Service liquor laws only prior to the time a decree of forfeiture is entered. Thereafter, the district court has exclusive jurisdiction.

(i) *Petitions granted.* If the Chief grants a remission or mitigates the forfeiture, the Chief shall mail a copy of the decision to the petitioner (or, if represented by an attorney, to the petitioner's attorney) and shall mail or transmit electronically a copy of the decision to the appropriate U.S. Attorney, the USMS or other property custodian, and the seizing agency. The written decision shall include the terms and conditions, if any, upon which the remission or mitigation is granted and the procedures the petitioner must follow to obtain release of the property or the monetary interest therein. The Chief shall advise the petitioner or the petitioner's attorney to consult with the U.S. Attorney as to such terms and conditions. The U.S. Attorney shall confer with the seizing agency regarding the release and shall coordinate disposition of the property with that office and the USMS or other property custodian.

(j) *Petitions denied.* If the Chief denies a petition, a copy of that decision shall be mailed to the petitioner (or, if represented by an attorney, to the petitioner's attorney of record) and mailed or transmitted electronically to the appropriate U.S. Attorney, the USMS or other property custodian, and to the seizing agency. The decision shall specify the reason that the petition was denied. The decision shall advise the petitioner that a request for reconsideration of the denial of the petition may be submitted to the Chief at the address provided in the decision, in accordance with § 9.4(k) of this part.

(k) *Request for reconsideration.* (1) A request for reconsideration of the denial shall be considered if:

(i) It is postmarked or received by the Asset Forfeiture and Money Laundering Section at the address contained in the decision denying the petition within 10 days from the receipt of the notice of denial of the petition by the petitioner;

(ii) A copy of the request is also received by the appropriate U.S. Attorney within 10 days of the receipt of the denial by the petitioner; and

(iii) The request is based on information or evidence not previously considered that is material to the basis for the denial or presents a basis clearly demonstrating that the denial was erroneous.

(2) In no event shall a request for reconsideration be decided by the ruling official who ruled on the original petition.

(3) Only one request for reconsideration of a denial of a petition shall be considered.

(4) Upon receipt of the request for reconsideration of the denial of a petition, disposition of the property will be delayed pending notice of the decision at the request of the Chief. If the request for reconsideration is not received within the prescribed period, the USMS may dispose of the property.

(l) *Restoration of proceeds from sale.* (1) A petition for restoration of the proceeds from the sale of forfeited property, or for the appraised value of forfeited property when the forfeited property has been retained by or delivered to a government agency for official use, may be submitted by an owner or lienholder in cases in which the petitioner:

(i) Did not know of the seizure prior to the entry of a final order of forfeiture; and

(ii) Could not reasonably have known of the seizure prior to the entry of a final order of forfeiture.

(2) Such a petition must be submitted pursuant to § 9.4(b) through (e) of this part within 90 days of the date the property was sold or otherwise disposed of.

§ 9.5 Criteria governing administrative and judicial remission and mitigation.

(a) *Remission.* (1) The ruling official shall not grant remission of a forfeiture unless the petitioner establishes that the petitioner has a valid, good faith, and legally cognizable interest in the seized property as owner or lienholder as defined in this part and is an innocent owner within the meaning of 18 U.S.C. 983(d)(2)(A) or 983(d)(3)(A).

(2) For purposes of paragraph (a)(1) of this section, the knowledge and responsibilities of a petitioner's representative, agent, or employee are imputed to the petitioner where the representative, agent, or employee was acting in the course of his or her employment and in furtherance of the petitioner's business.

(3) The petitioner has the burden of establishing the basis for granting a petition for remission or mitigation of forfeited property, a restoration of proceeds of sale or appraised value of forfeited property, or a reconsideration of a denial of such a petition. Failure to provide information or documents and to submit to interviews, as requested, may result in a denial of the petition.

(4) The ruling official shall presume a valid forfeiture and shall not consider whether the evidence is sufficient to support the forfeiture.

(5) Willful, materially-false statements or information made or furnished by the

petitioner in support of a petition for remission or mitigation of forfeited property, the restoration of proceeds or appraised value of forfeited property, or the reconsideration of a denial of any such petition, shall be grounds for denial of such petition and possible prosecution for the filing of false statements.

(b) *Mitigation.* (1) The ruling official may grant mitigation to a party not involved in the commission of the offense underlying forfeiture:

(i) Where the petitioner has not met the minimum conditions for remission, but the ruling official finds that some relief should be granted to avoid extreme hardship, and that return of the property combined with imposition of monetary or other conditions of mitigation in lieu of a complete forfeiture will promote the interest of justice and will not diminish the deterrent effect of the law. Extenuating circumstances justifying such a finding include those circumstances that reduce the responsibility of the petitioner for knowledge of the illegal activity, knowledge of the criminal record of a user of the property, or failure to take reasonable steps to prevent the illegal use or acquisition by another for some reason, such as a reasonable fear of reprisal; or

(ii) Where the minimum standards for remission have been satisfied but the overall circumstances are such that, in the opinion of the ruling official, complete relief is not warranted.

(2) The ruling official may in his or her discretion grant mitigation to a party involved in the commission of the offense underlying the forfeiture where certain mitigating factors exist, including, but not limited to: The lack of a prior record or evidence of similar criminal conduct; if the violation does not include drug distribution, manufacturing, or importation, the fact that the violator has taken steps, such as drug treatment, to prevent further criminal conduct; the fact that the violation was minimal and was not part of a larger criminal scheme; the fact that the violator has cooperated with Federal, state, or local investigations relating to the criminal conduct underlying the forfeiture; or the fact that complete forfeiture of an asset is not necessary to achieve the legitimate purposes of forfeiture.

(3) Mitigation may take the form of a monetary condition or the imposition of other conditions relating to the continued use of the property, and the return of the property, in addition to the imposition of any other costs that would be chargeable as a condition to remission. This monetary condition is considered as an item of cost payable by the petitioner, and shall be deposited into the Assets Forfeiture Fund as an amount realized from forfeiture in accordance with the applicable statute. If the petitioner fails to accept the ruling official's mitigation decision or any of its conditions, or fails to pay the monetary amount within 20 days of the receipt of the decision, the property shall be sold, and the monetary amount imposed and other costs chargeable as a condition to mitigation shall be subtracted from the proceeds of the sale before transmitting the remainder to the petitioner.

§ 9.6 Special rules for specific petitioners.

(a) *General creditors.* A general creditor may not be granted remission or mitigation of forfeiture unless he or she otherwise qualifies as petitioner under this part.

(b) *Rival claimants.* If the beneficial owner of the forfeited property and the owner of a security interest in the same property each file a petition, and if both petitions are found to be meritorious, the claims of the beneficial owner shall take precedence.

(c) *Voluntary bailments.* A petitioner who allows another to use his or her property without cost, and who is not in the business of lending money secured by property or of leasing or renting property for profit, shall be granted remission or mitigation of forfeiture in accordance with the provisions of § 9.5 of this part.

(d) *Lessors.* A person engaged in the business of leasing or renting real or personal property on a long-term basis with the right to sublease shall not be entitled to remission or mitigation of a forfeiture of such property unless the lessor can demonstrate compliance with all the requirements of § 9.5 of this part.

(e) *Straw owners.* A petition by any person who has acquired a property interest recognizable under this part, and who knew or had reason to believe that the interest was conveyed by the previous owner for the purpose of circumventing seizure, forfeiture, or the regulations in this part, shall be denied. A petition by a person who purchases or owns property for another who has a record for related crimes as defined in § 9.2 of this part, or a petition by a lienholder who knows or has reason to believe that the purchaser or owner of record is not the real purchaser or owner, shall be denied unless both the purchaser of record and the real purchaser or owner meet the requirements of § 9.5 of this part.

(f) *Judgment creditors.* (1) A judgment creditor will be recognized as a lienholder if:

(i) The judgment was duly recorded before the seizure of the property for forfeiture;

(ii) Under applicable state or other local law, the judgment constitutes a valid lien on the property that attached to it before the seizure of the property for forfeiture; and

(iii) The petitioner had no knowledge of the commission of any act or acts giving rise to the forfeiture at the time the judgment became a lien on the forfeited property.

(2) A judgment creditor will not be recognized as a lienholder if the property in question is not property of which the judgment debtor is entitled to claim ownership under applicable state or other local law (*e.g.,* stolen property). A judgment creditor is entitled under this part to no more than the amount of the judgment, exclusive of any interest, costs, or other fees including attorney fees associated with the action that led to the judgment or its collection.

(3) A judgment creditor's lien must be registered in the district where the property is located if the judgment was obtained outside the district.

§ 9.7 Terms and conditions of remission and mitigation.

(a) *Owners.* (1) An owner's interest in property that has been forfeited is represented by the property itself or by a monetary interest equivalent to that interest at the time of seizure. Whether the property or a monetary equivalent will be remitted to an owner shall be determined at the discretion of the ruling official.

(2) If a civil judicial forfeiture action against the property is pending, release of the property must await an appropriate court order.

(3) Where the Government sells or disposes of the property prior to the grant of the remission, the owner shall receive the proceeds of that sale, less any costs incurred by the Government in the sale. The ruling official, at his or her discretion, may waive the deduction of costs and expenses incident to the forfeiture.

(4) Where the owner does not comply with the conditions imposed upon release of the property by the ruling official, the property shall be sold. Following the sale, the proceeds shall be used to pay all costs of the forfeiture and disposition of the property, in addition to any monetary conditions imposed. The remaining balance shall be paid to the owner.

(b) *Lienholders.* (1) When the forfeited property is to be retained for official use or transferred to a state or local law enforcement agency or foreign government pursuant to law, and

remission or mitigation has been granted to a lienholder, the recipient of the property shall assure that:

(i) In the case of remission, the lien is satisfied as determined through the petition process; or

(ii) In the case of mitigation, an amount equal to the net equity, less any monetary conditions imposed, is paid to the lienholder prior to the release of the property to the recipient agency or foreign government.

(2) When the forfeited property is not retained for official use or transferred to another agency or foreign government pursuant to law, the lienholder shall be notified by the ruling official of the right to select either of the following alternatives:

(i) *Return of property.* The lienholder may obtain possession of the property after paying the United States, through the ruling official, the costs and expenses incident to the forfeiture, the amount, if any, by which the appraised value of the property exceeds the lienholder's net equity in the property, and any amount specified in the ruling official's decision as a condition to remit the property. The ruling official, at his or her discretion, may waive costs and expenses incident to the forfeiture. The ruling official shall forward a copy of the decision, a memorandum of disposition, and the original releases to the USMS or other property custodian who shall thereafter release the property to the lienholder; or

(ii) *Sale of property and payment to lienholder.* Subject to § 9.9(a) of this part, upon sale of the property, the lienholder may receive the payment of a monetary amount up to the sum of the lienholder's net equity, less the expenses and costs incident to the forfeiture and sale of the property, and any other monetary conditions imposed. The ruling official, at his or her discretion, may waive costs and expenses incident to the forfeiture.

(3) If the lienholder does not notify the ruling official of the selection of one of the two options set forth in § 9.7(b)(2) of this part within 20 days of the receipt of notification, the ruling official shall direct the USMS or other property custodian to sell the property and pay the lienholder an amount up to the net equity, less the costs and expenses incurred incident to the forfeiture and sale, and any monetary conditions imposed. In the event a lienholder subsequently receives a payment of any kind on the debt owed for which he or she received payment as a result of the granting of remission or mitigation, the lienholder shall reimburse the Assets Forfeiture Fund to the extent of the payment received.

(4) Where the lienholder does not comply with the conditions imposed upon the release of the property, the property shall be sold after forfeiture. From the proceeds of the sale, all costs incident to the forfeiture and sale shall first be deducted, and the balance up to the net equity, less any monetary conditions, shall be paid to the lienholder.

§ 9.8 Remission procedures for victims.

This section applies to victims of an offense underlying the forfeiture of property, or of a related offense, who do not have a present ownership interest in the forfeited property (or, in the case of multiple victims of an offense, who do not have a present ownership interest in the forfeited property that is clearly superior to that of other petitioner victims). This section applies only with respect to property forfeited pursuant to statutes that explicitly authorize restoration or remission of forfeited property to victims. A victim requesting remission under this section may concurrently request remission as an owner, pursuant to the regulations set forth in §§ 9.3, 9.4, and 9.7 of this part. The claims of victims granted remission as both an owner and victim shall, like claims of other owners, have priority over the claims of any non-owner victims whose claims are recognized under this section.

(a) *Remission procedure for victims.* (1) *Where to file.* Persons seeking remission as victims shall file petitions for remission with the appropriate deciding official as described in § 9.3(e) (administrative forfeiture) or § 9.4(e) (judicial forfeiture) of this part.

(2) *Time of decision.* The deciding official or his designee as described in § 9.1(b) of this part may consider petitions filed by persons claiming eligibility for remission as victims at any time prior to the disposal of the forfeited property in accordance with law.

(3) *Request for reconsideration.* Persons denied remission under this section may request reconsideration of the denial, in accordance with § 9.3(j) (administrative forfeiture) or § 9.4(k) (judicial forfeiture) of this part.

(b) *Qualification to file.* A victim, as defined in § 9.2 of this part, may be granted remission, if in addition to complying with the other applicable provisions of § 9.8, the victim satisfactorily demonstrates that:

(1) A pecuniary loss of a specific amount has been directly caused by the criminal offense, or related offense, that was the underlying basis for the forfeiture, and that the loss is supported by documentary evidence including invoices and receipts;

(2) The pecuniary loss is the direct result of the illegal acts and is not the result of otherwise lawful acts that were committed in the course of a criminal offense;

(3) The victim did not knowingly contribute to, participate in, benefit from, or act in a willfully blind manner towards the commission of the offense, or related offense, that was the underlying basis of the forfeiture;

(4) The victim has not in fact been compensated for the wrongful loss of the property by the perpetrator or others; and

(5) The victim does not have recourse reasonably available to other assets from which to obtain compensation for the wrongful loss of the property.

(c) *Pecuniary loss.* The amount of the pecuniary loss suffered by a victim for which remission may be granted is limited to the fair market value of the property of which the victim was deprived as of the date of the occurrence of the loss. No allowance shall be made for interest forgone or for collateral expenses incurred to recover lost property or to seek other recompense.

(d) *Torts.* A tort associated with illegal activity that formed the basis for the forfeiture shall not be a basis for remission, unless it constitutes the illegal activity itself, nor shall remission be granted for physical injuries to a petitioner or for damage to a petitioner's property.

(e) *Denial of petition.* In the exercise of his or her discretion, the ruling official may decline to grant remission where:

(1) There is substantial difficulty in calculating the pecuniary loss incurred by the victim or victims;

(2) The amount of the remission, if granted, would be small compared with the amount of expenses incurred by the Government in determining whether to grant remission; or

(3) The total number of victims is large and the monetary amount of the remission so small as to make its granting impractical.

(f) *Pro rata basis.* In granting remission to multiple victims pursuant to this section, the ruling official should generally grant remission on a pro rata basis to recognized victims when petitions cannot be granted in full due to the limited value of the forfeited property. However, the ruling official may consider, among others, the following factors in establishing appropriate priorities in individual cases:

(1) The specificity and reliability of the evidence establishing a loss;

(2) The fact that a particular victim is suffering an extreme financial hardship;

(3) The fact that a particular victim has cooperated with the Government in the investigation related to the forfeiture or to a related prosecution or civil action; and

(4) In the case of petitions filed by multiple victims of related offenses, the fact that a particular victim is a victim of the offense underlying the forfeiture.

(g) *Reimbursement.* Any petitioner granted remission pursuant to this part shall reimburse the Assets Forfeiture Fund for the amount received to the extent the individual later receives compensation for the loss of the property from any other source. The petitioner shall surrender the reimbursement upon payment from any secondary source.

(h) *Claims of financial institution regulatory agencies.* In cases involving property forfeitable under 18 U.S.C. 981(a)(1)(C) or (D), the ruling official may decline to grant a petition filed by a petitioner in whole or in part due to the lack of sufficient forfeitable funds to satisfy both the petition and claims of the financial institution regulatory agencies pursuant to 18 U.S.C. 981(e)(3) or (7). Generally, claims of financial institution regulatory agencies pursuant to 18 U.S.C. 981(e)(3) or (7) shall take priority over claims of victims.

(i) *Amount of remission.* Consistent with the Assets Forfeiture Fund statute (28 U.S.C. 524(c)), the amount of remission shall not exceed the victim's share of the net proceeds of the forfeitures associated with the activity that caused the victim's loss. The calculation of net proceeds includes, but is not limited to, the deduction of allowable government expenses and valid third-party claims.

§ 9.9 Miscellaneous provisions.

(a) *Priority of payment.* Except where otherwise provided in this part, costs incurred by the USMS and other agencies participating in the forfeiture that were incident to the forfeiture, sale, or other disposition of the property shall be deducted from the amount available for remission or mitigation. Such costs include, but are not limited to, court costs, storage costs, brokerage and other sales-related costs, the amount of any liens and associated costs paid by the Government on the property, costs incurred in paying the ordinary and necessary expenses of a business seized for forfeiture, awards for information as authorized by statute, expenses of trustees or other assistants pursuant to § 9.9(c) of this part, investigative or prosecutive costs specially incurred incident to the particular forfeiture, and costs incurred incident to the processing of the petition(s) for remission or mitigation. The remaining balance shall be available for remission or mitigation. The ruling official shall direct the distribution of the remaining balance in the following order of priority, except that the ruling official may exercise discretion in determining the priority between petitioners belonging to classes described in paragraphs (a)(3) and (4) of this section in exceptional circumstances:

(1) Owners;

(2) Lienholders;

(3) Federal financial institution regulatory agencies (pursuant to paragraph (e) of this section), not constituting owners or lienholders; and

(4) Victims not constituting owners or lienholders (pursuant to § 9.8 of this part).

(b) *Sale or disposition of property prior to ruling.* If forfeited property has been sold or otherwise disposed of prior to a ruling, the ruling official may grant relief in the form of a monetary amount. The amount realized by the sale of the property is presumed to be the value of the property. Monetary relief shall not be greater than the appraised value of the property at the time of seizure and shall not exceed the amount realized from the sale or other disposition. The proceeds of the sale shall be distributed as follows:

(1) Payment of the Government's expenses incurred incident to the forfeiture and sale, including court costs and storage charges, if any;

(2) Payment to the petitioner of an amount up to his or her interest in the property;

(3) Payment to the Assets Forfeiture Fund of all other costs and expenses incident to the forfeiture;

(4) In the case of victims, payment of any amount up to the amount of his or her loss; and

(5) Payment of the balance remaining, if any, to the Assets Forfeiture Fund.

(c) *Trustees and other assistants.* In the exercise of his or her discretion, the ruling official, with the approval of the Asset Forfeiture and Money Laundering Section, may use the services of a trustee, other government official, or appointed contractors to notify potential petitioners, process petitions, and make recommendations to the ruling official on the distribution of property to petitioners. The expense for such assistance shall be paid out of the forfeited funds.

(d) *Other agencies of the United States.* Where another agency of the United States is entitled to remission or mitigation of forfeited assets because of an interest that is recognizable under this part or is eligible for such transfer pursuant to 18 U.S.C. 981(e)(6), such agency shall request the transfer in writing, in addition to complying with any applicable provisions of §§ 9.3 through 9.5 of this part. The decision to make such transfer shall be made in writing by the ruling official.

(e) *Financial institution regulatory agencies.* A ruling official may direct the transfer of property under 18 U.S.C. 981(e) to certain Federal financial institution regulatory agencies or an entity acting on their behalf, upon receipt of a written request, in lieu of ruling on a petition for remission or mitigation.

(f) *Transfers to foreign governments.* A ruling official may decline to grant remission to any petitioner other than an owner or lienholder so that forfeited assets may be transferred to a foreign government pursuant to 18 U.S.C. 981(i)(1), 19 U.S.C. 1616a(c)(2), or 21 U.S.C. 881(e)(1)(E).

(g) *Filing by attorneys.* (1) A petition for remission or mitigation may be filed by a petitioner or by his or her attorney or legal guardian. If an attorney files on behalf of the petitioner, the petition must include a signed and sworn statement by the client-petitioner stating that:

(i) The attorney has the authority to represent the petitioner in this proceeding;

(ii) The petitioner has fully reviewed the petition; and

(iii) The petition is truthful and accurate in every respect.

(2) Verbal notification of representation is not acceptable. Responses and notification of rulings shall not be sent to an attorney claiming to represent a petitioner unless a written notice of representation is filed. No extensions of time shall be granted due to delays in submission of the notice of representation.

(h) *Consolidated petitions.* At the discretion of the ruling official in individual cases, a petition may be filed by one petitioner on behalf of other petitioners, provided the petitions are based on similar underlying facts, and the petitioner who files the petition has written authority to do so on behalf of the other petitioners. This authority must be either expressed in documents giving the petitioner the authority to file petitions for remission, or reasonably implied from documents giving the petitioner express authority to file claims or lawsuits related to the course of conduct in question on behalf of these petitioners. An insurer or an administrator of an employee benefit plan, for example, which itself has standing to file a petition as a "victim"

within the meaning of § 9.2 of this part, may also file a petition on behalf of its insured or plan beneficiaries for any claims they may have based on co-payments made to the perpetrator of the offense underlying the forfeiture or the perpetrator of a "related offense" within the meaning of § 9.2 of this part, if the authority to file claims or lawsuits is contained in the document or documents establishing the plan. Where such a petition is filed, any amounts granted as a remission must be transferred to the other petitioners, not the party filing the petition; although, in his or her discretion, the ruling official may use the actual petitioner as an intermediary for transferring the amounts authorized as a remission to the other petitioners.

Dated: April 18, 2011.

Eric H. Holder, Jr.,

Attorney General.

[FR Doc. 2011–9826 Filed 5–6–11; 8:45 am]

BILLING CODE 4410–02–P; 4410–FY–P; 4410–09–P; 4410–14–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 31

[REG–151687–10]

RIN 1545–BJ98

Withholding on Payments by Government Entities to Persons Providing Property or Services

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of proposed rulemaking.

SUMMARY: This document contains proposed regulations relating to withholding by government entities on payments to persons providing property or services. The proposed regulations reflect changes in the law made by the Tax Increase Prevention and Reconciliation Act of 2005 that require Federal, State, and local government entities to withhold income tax when making payments to persons providing property or services. These proposed regulations would change the provisions related to the effective date of the final regulations concerning these withholding requirements that are being issued concurrently with these proposed regulations. The guidance affects government entities that are required to withhold from payments to persons providing property or services and persons receiving the payments.

DATES: Written or electronic comments and requests for a public hearing must be received by August 8, 2011.

ADDRESSES: Send submissions to: CC:PA:LPD:PR (REG–151687–10), room 5205, Internal Revenue Service, P.O. Box 7604, Ben Franklin Station, Washington, DC 20044. Submissions may be hand-delivered Monday through Friday between the hours of 8 a.m. and 4 p.m. to CC:PA:LPD:PR (REG–151687–10), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue, NW., Washington, DC or sent electronically via the Federal eRulemaking Portal at *http://www.regulations.gov/* (IRS REG–151687–10).

FOR FURTHER INFORMATION CONTACT: Concerning these proposed regulations, A.G. Kelley, (202) 622–6040; concerning submissions of comments or to request a public hearing, Oluwafunmilayo Taylor at (202) 622–7180 (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

Background

This document contains proposed amendments to 26 CFR Part 31 under section 3402(t) of the Internal Revenue Code (Code). Section 3402(t) of the Code was added by section 511 of the Tax Increase Prevention and Reconciliation Act of 2005, Public Law 109–222 (TIPRA), 120 Stat. 345, which was enacted into law on May 17, 2006. Section 3402(t)(1) provides that the Government of the United States, every State, every political subdivision thereof, and every instrumentality of the foregoing (including multi-State agencies) making any payment to any person providing any property or services (including any payment made in connection with a government voucher or certificate program which functions as a payment for property or services) shall deduct and withhold from such payment a tax in an amount equal to 3 percent of such payment. Section 3402(t)(2) provides exceptions to withholding under section 3402(t).

Section 1511 of the American Recovery and Reinvestment Act of 2009 (Pub. L. 111–5), 123 Stat. 115, 355, amended the effective date of section 3402(t) withholding. As amended, the statute provides that section 3402(t) applies to payments made after December 31, 2011.

Notice 2010–91, 2010–52 IRB 915, provided interim guidance on the application of section 3402(t) to payments by debit cards, credit cards, stored value cards, and other payment cards.

Proposed regulations under sections 3402(t), 3406, 6011, 6051, 6071, and 6302 of the Code were published in the **Federal Register** on December 5, 2008 (REG–158747–06, 73 FR 74082, 2009–4 IRB 362) (the "2008 proposed regulations"). The 2008 proposed regulations proposed applying the withholding obligations to payments beginning on January 1, 2011, but proposed excluding payments made under contracts existing on January 1, 2011, unless those contracts were materially modified. The final regulations provide an additional one-year extension beyond the amended effective date of the statute. Thus, under the final regulations, the withholding obligation applies to payments made after December 31, 2012, and the exclusion applies to contracts existing on December 31, 2012, that are not materially modified on or after December 31, 2012. These final regulations under sections 3402(t), 3406, 6011, 6051, 6071, and 6302 of the Code (REG–158747–06, Treasury decision) are being published in the **Federal Register** concurrently with these proposed regulations.

Several commenters on the 2008 proposed regulations expressed concern that the requirement to differentiate between payments subject to withholding and payments not subject to withholding based on whether the payment was made under a contract existing on December 31, 2011, and whether that contract had been materially modified, would be burdensome to apply. In response to these concerns, these proposed regulations would provide that the exclusion for payments under existing contracts that had not been materially modified would terminate with payments after December 31, 2013. Thus, these proposed regulations would subject payments under all contracts to section 3402(t) withholding after December 31, 2013, unless another exception applied. This rule would avoid the administrative burden of distinguishing between payments made under existing contracts and all other payments while allowing time to address concerns about applying the withholding requirements to existing contracts.

Proposed Effective Date

These regulations are proposed to apply to payments made after December 31, 2011.

Special Analyses

It has been determined that this notice of proposed rulemaking is not a significant regulatory action as defined

in Executive Order 12866. Therefore, a regulatory assessment is not required. It also has been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to this regulation, and because the regulation does not impose a collection of information on small entities, the Regulatory Flexibility Act (5 U.S.C. chapter 6) does not apply. Pursuant to section 7805(f) of the Internal Revenue Code, this regulation has been submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

Comments and Requests for Public Hearing

Before these proposed regulations are adopted as final regulations, consideration will be given to any written (a signed original and eight (8) copies) or electronic comments that are timely submitted to the IRS. All comments will be available at *http://www.regulations.gov* or for public inspection and copying upon request. A public hearing will be scheduled if requested in writing by any person that timely submits written or electronic comments. If a public hearing is scheduled, notice of the date, time, and place for the hearing will be published in the **Federal Register.**

Drafting Information

The principal author of these proposed regulations is A.G. Kelley, Office of the Division Counsel/Associate Chief Counsel (Tax Exempt and Government Entities). However, other personnel from the IRS and the Treasury Department participated in their development.

List of Subjects in 26 CFR Part 31

Employment taxes, Fishing vessels, Gambling, Income taxes, Penalties, Pensions, Railroad retirement, Reporting and recordkeeping requirements, Social Security, Unemployment compensation.

Proposed Amendments to the Regulations

Accordingly, 26 CFR part 31 is proposed to be amended as follows:

PART 31—EMPLOYMENT TAXES AND COLLECTION OF INCOME TAX AT SOURCE

Paragraph 1. The authority citation for part 31 continues to read in part as follows:

Authority: 26 U.S.C. 7805 * * *

Par. 2. Section 31.3402(t)–1 is amended by revising paragraph (d)(2) to read as follows:

§ 31.3402(t)–1 Withholding requirement on certain payments made by government entities.

* * * * *

(d) * * *

(2) Payments made under a written binding contract that was in effect on December 31, 2012, are not subject to the withholding requirements of this section for payments made prior to January 1, 2014. The preceding sentence does not apply to payments made under any contract that is materially modified after December 31, 2012. For this purpose, a material modification includes only a modification that materially affects the property or services to be provided under the contract, the terms of payment for the property or services under the contract, or the amount payable for the property or services under the contract. Notwithstanding the foregoing, a material modification does not include a mere renewal of a contract. A material modification also does not include a modification to the contract required by applicable Federal, State or local law. The amendment to § 31.3402(t)–1(d)(2) applies with respect to payments made after December 31, 2012.

Steven T. Miller,

Deputy Commissioner for Services and Enforcement.

[FR Doc. 2011–10758 Filed 5–6–11; 8:45 am]

BILLING CODE 4830–01–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R03–OAR–2010–0770; FRL–9303–1]

Approval and Promulgation of Air Quality Implementation Plans; Delaware; Requirements for Preconstruction Review, Prevention of Significant Deterioration

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is proposing to approve a State Implementation Plan (SIP) revision submitted by the Delaware Department of Natural Resources and Environmental Control on April 1, 2010. This revision will establish nitrogen oxides (NO_X) as a precursor to ozone within the Delaware SIP. This action is being taken under the Clean Air Act (CAA).

DATES: Written comments must be received on or before June 8, 2011.

ADDRESSES: Submit your comments, identified by Docket ID Number EPA–R03–OAR–2010–0770 by one of the following methods:

A. *http://www.regulations.gov.* Follow the on-line instructions for submitting comments.

B. *E-mail: cox.kathleen@epa.gov.*

C. *Mail:* EPA–R03–OAR–2010–0770, Kathleen Cox, Associate Director, Office of Permits and Air Toxics, Mailcode 3AP10, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103.

D. *Hand Delivery:* At the previously-listed EPA Region III address. Such deliveries are only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to Docket ID No. EPA–R03–OAR–2010–0770. EPA's policy is that all comments received will be included in the public docket without change, and may be made available online at *http://www.regulations.gov,* including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through *http://www.regulations.gov* or e-mail. The *www.regulations.gov* Web site is an "anonymous access" system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through *http://www.regulations.gov,* your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

Docket: All documents in the electronic docket are listed in the *http://www.regulations.gov* index. Although listed in the index, some information is not publicly available, *i.e.,* CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly

available only in hard copy form. Publicly available docket materials are available either electronically in *http://www.regulations.gov* or in hard copy during normal business hours at the Air Protection Division, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103. Copies of the State submittal are available at the Delaware Department of Natural Resources and Environmental Control, 89 Kings Highway, P.O. Box 1401, Dover, Delaware 19903.

FOR FURTHER INFORMATION CONTACT: Sharon McCauley, (215) 814–3376, or by e-mail at *mccauley.sharon@epa.gov.*

SUPPLEMENTARY INFORMATION: Throughout this document, whenever "we," "us," or "our" is used, we mean EPA. On April 1, 2010, Delaware submitted a revision to its SIP for changes noted in Regulation 1125, Requirements for Preconstruction Review, Prevention of Significant Deterioration (PSD) found in section 3.0 of Regulation 1125 (Regulation 1125, section 3.0).

I. Background

This SIP revision governs the permits for constructing and significantly modifying major stationary sources of air pollutants in PSD areas located in Delaware. This regulatory revision was made effective as a legislative rule in Delaware on April 11, 2010. This regulatory revision became effective as a legislative rule in the State on April 11, 2010 and can be found in Regulation 1125, section 3.0. This SIP revision, as proposed, will only replace the current regulations found in Regulation 1125, section 3.0 which establish NO_X as a precursor to ozone, but will keep intact the formally approved Delaware SIP increments for NO_X found in the **Federal Register** action for Delaware dated July 27, 1993 (58 FR 40065).

Delaware's proposed SIP submission addresses changes needed in the part C PSD permit program. This SIP submission also corrects deficiencies identified by EPA in the March 27, 2008 **Federal Register** action entitled, "Completeness Findings for Section 110(a) State Implementation Plans for the 8-hour Ozone National Ambient Air Quality Standards (1997 Ozone NAAQS)" (73 FR 16205). EPA's proposed approval of this SIP submission addresses Delaware's compliance with the portion of CAA Section 110(a)(2)(C) & (J) relating to the CAA's part C permit program for the 1997 Ozone NAAQS, because this proposed approval would approve regulating NO_X as a precursor to ozone in Delaware's SIP in accordance with the **Federal Register** action dated November 29, 2005 (70 FR 71612) that finalized NO_X as a precursor for ozone regulations set forth at 40 CFR 51.166 and in 40 CFR 52.21.

We have determined that the current amendments to Delaware's PSD permit program at Regulation 1125, section 3.0, as submitted on April 1, 2010, meet the minimum requirements of 40 CFR 51.166 and the CAA. This SIP proposal is being proposed as a full approvable revision to the Delaware SIP. No other changes to the currently approved SIP are being proposed for approval at this time.

II. Summary of SIP Revision

This rule establishes a state construction permit program consistent with the federal CAA's Title I program and implementing regulations at 40 CFR 51.166, "Prevention of Significant Deterioration of Air Quality." Regulation 1125, section 3.0 is part of the SIP and sets forth the criteria and procedures for major stationary sources to obtain a permit to construct, operate and/or modify a major stationary source.

As required by 40 CFR Part 51, Subpart I—"Review of New Sources and Modifications," this rule adopts criteria and procedures for the prevention of significant deterioration of air quality that are consistent with the governing federal regulation at 40 CFR 51.166. Promulgation of this rule by the Legislature was necessary for Delaware to fulfill its responsibilities under 40 CFR Part 51 and the CAA, as amended. Revisions to the Delaware rule simply added new references to include NO_X as a precursor to ozone to comport with federal counterpart language. The Delaware Department of Natural Resources and Environmental Control has now submitted a final rule Regulation 1125, section 3.0 as a proposed revision to the SIP. We are now proposing to approve NO_X as a precursor to ozone in the Delaware SIP.

III. Proposed Action

Delaware's proposed SIP submission addresses changes needed to be equivalent to the CAA's part C PSD permit program. This SIP submission also corrects deficiencies identified by EPA in the March 27, 2008 **Federal Register** action entitled, "Completeness Findings for Section 110(a) State Implementation Plans for the 8-hour Ozone National Ambient Air Quality Standards (1997 Ozone NAAQS)" (73 FR 16205). EPA's proposed approval of this SIP submission addresses Delaware's compliance with the portion of CAA Section 110(a)(2)(C) & (J) relating to the CAA's part C permit program for the 1997 Ozone NAAQS, because this proposal would approve regulating NO_X as a precursor to ozone in Delaware's SIP in accordance with the **Federal Register** action dated November 29, 2005 (70 FR 71612) that finalized NO_X as a precursor for ozone regulations set forth at 40 CFR 51.166 and in 40 CFR 52.21.

EPA is proposing to approve this Delaware SIP revision for the changes made to Regulation 1125, section 3.0, as was submitted on April 1, 2010. EPA is soliciting public comments on the issues discussed in this document. These comments will be considered before taking final action.

IV. Statutory and Executive Order Reviews

Under the CAA, the Administrator is required to approve a SIP submission that complies with the provisions of the Act and applicable Federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the CAA. Accordingly, this action merely proposes to approve state law as meeting Federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this proposed action:

- Is not a "significant regulatory action" subject to review by the Office of Management and Budget under Executive Order 12866 (58 FR 51735, October 4, 1993);
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4);
- Does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because

application of those requirements would be inconsistent with the CAA; and

• Does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

This proposed rule, for the inclusion of NO_X as a precursor to ozone in Delaware for the PSD program, does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because the SIP is not approved to apply in Indian country located in the state, and will not impose substantial direct costs on tribal governments or preempt tribal law.

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Intergovernmental relations, Nitrogen dioxide, Ozone, Reporting and recordkeeping requirements.

Authority: 42 U.S.C. 7401 *et seq.*

Dated: April 20, 2011.

W.C. Early,

Acting Regional Administrator, Region III.

[FR Doc. 2011–11215 Filed 5–6–11; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 272

[FRL–9293–8]

Wisconsin: Incorporation by Reference of Approved State Hazardous Waste Management Program

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA proposes to codify in the regulations entitled "Approved State Hazardous Waste Management Programs," Wisconsin's authorized hazardous waste program. EPA will incorporate by reference into the Code of Federal Regulations (CFR) those provisions of the State regulations that are authorized and that the EPA will enforce under the Solid Waste Disposal Act, commonly referred to as the Resource Conversation and Recovery Act (RCRA).

DATES: Send written comments by June 8, 2011.

ADDRESSES: Send written comments to Jean Gromnicki, U.S. EPA, Region 5, 77 West Jackson Boulevard, Mail Code LR–8J, Chicago, Illinois 60604. You may also submit comments electronically or through hand delivery/courier; please follow the detailed instructions in the **ADDRESSES** section of the immediate final rule which is located in the Rules section of this **Federal Register**.

FOR FURTHER INFORMATION CONTACT: Jean Gromnicki, U.S. EPA, Region 5, 77 West Jackson Boulevard, Mail Code LR–8J, Chicago, Illinois 60604, *gromnicki.jean@epa.gov,* (312) 886–6162.

SUPPLEMENTARY INFORMATION: In the "Rules and Regulations" section of this **Federal Register**, EPA is codifying and incorporating by reference the State's hazardous waste program as an immediate final rule. EPA did not make a proposal prior to the immediate final rule because we believe these actions are not controversial and do not expect comments that oppose them. We have explained the reasons for this codification and incorporation by reference in the preamble to the immediate final rule. If we do not get written comments which oppose this incorporation by reference during the comment period, the immediate final rule will become effective on the date it establishes, and we will not take further action on this proposal. If we get comments that oppose these actions, we will withdraw the immediate final rule and it will not take effect. We will then respond to public comments in a later final rule based on this proposal. You may not have another opportunity for comment. If you want to comment on this action, you must do so at this time. For additional information, please see the immediate final rule published in the "Rules and Regulations" section of this **Federal Register**.

Authority: This action is issued under the authority of sections 2002(a), 3006 and 7004(b) of the Solid Waste and Disposal Act, as amended, 42 U.S.C. 6912(a), 6926, 6974(b).

Dated: March 24, 2011.

Susan Hedman,

Regional Administrator, Region 5.

[FR Doc. 2011–11155 Filed 5–6–11; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

49 CFR Parts 385, 386, 390, and 395

[Docket No. FMCSA–2004–19608]

RIN 2126–AB26

Hours of Service of Drivers

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Notice; availability of supplemental documents; reopening of comment period.

SUMMARY: FMCSA has placed four additional documents in the public docket of its recent notice of proposed rulemaking (NPRM) concerning hours of service (HOS) for commercial motor vehicle drivers. The Agency is reopening the comment period on the NPRM to allow for review and discussion of these documents and FMCSA's possible consideration of their findings in the development of the final rule. Comments will only be considered on the four documents listed below.

DATES: Comments are due by June 8, 2011.

ADDRESSES: You may submit comments identified by Federal Docket Management System Number FMCSA–2011–0039 using any of the following methods:

• *Federal eRulemaking Portal:* Go to *http://www.regulations.gov.*

• *Fax:* 202–493–2251.

• *Mail:* Docket Management Facility (M–30), U.S. Department of Transportation, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590–0001.

• *Hand Delivery:* West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590–0001, between 9 a.m. and 5 p.m., e.t., Monday through Friday, except Federal holidays. The telephone number is 202–366–9329.

Instructions: All submissions must include the Agency name and docket number (FMCSA–2011–0039) for this rulemaking. To avoid duplication, please use only one of these four methods. Note that all comments received will be posted without change to *http://www.regulations.gov,* including any personal information provided. Please refer to the Privacy Act heading for further information.

Comments received after the comment closing date will be included in the docket and we will consider late comments only to the extent practicable. FMCSA may issue a final rule at any time after the close of the comment period.

Docket: For access to the docket to read background documents or comments received, go to *http://www.regulations.gov* at any time or to West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m., e.t., Monday through Friday, except Federal holidays.

Privacy Act: Anyone is able to search the electronic form for all comments

received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, *etc.*). You may review the U.S. Department of Transportation's (DOT) complete Privacy Act Statement in the **Federal Register** published on January 17, 2008 (73 FR 3316), or you may visit *http://edocket.access.gpo.gov/2008/pdf/E8-785.pdf.*

FOR FURTHER INFORMATION CONTACT: Mr. Thomas Yager, Chief, Driver and Carrier Operations Division, Federal Motor Carrier Safety Administration, U.S. Department of Transportation, 1200 New Jersey Avenue, SE., Washington, DC 20590, (202) 366–4325.

SUPPLEMENTARY INFORMATION:

Availability of Supplemental Documents

For a full background on this rulemaking, please see the preamble to the NPRM (75 FR 82170, December 29, 2010). The docket (FMCSA–2004–19608) contains all of the background information for this rulemaking, including comments. FMCSA has placed these four research reports in the docket:

- Blanco, M., Hanowski, R., Olson, R., Morgan, J., Soccolich, S., Wu, S.C., and Guo, F., "The Impact of Driving, Non-Driving Work, and Rest Breaks on Driving Performance in Commercial Motor Vehicle Operations," FMCSA, April 2011.
- Jovanis, J.P., Wu, K.F., and Chen, C., "Hours of Service and Driver Fatigue—Driver Characteristics Research," FMCSA, April 2011.
- Sando, T., Angel, M., Mtoi, E., and Moses, R., "Analysis of the Relationship Between Operator Cumulative Driving Hours and Involvement in Preventable Collisions," Transportation Research Board of the National Academies' 2011 90th Annual Meeting, Paper No.: 11–4165, November 2010.
- Sando, T., Mtoi, E., and Moses, R., "Potential Causes Of Driver Fatigue: A Study On Transit Bus Operators In Florida," Transportation Research Board of the National Academies' 2011 90th Annual Meeting, Paper No.: 11–3398, November 2010.

The two Sando, *et al.,* reports discuss research similar to that which the Florida Department of Transportation Transit Office submitted to the docket on March 4, 2011 (docket item 23834: Sando, T., Moses, R., Angel, M., and Mtoi, E., "Safety Implications of Transit Operator Schedule Policies," University of North Florida and Florida Department of Transportation, October 2010). The two additional reports by Sando and his colleagues were published by the Transportation Research Board of the National Academies for its 2011 90th Annual Meeting. They were provided to 2011 Annual Meeting participants on digital video disk and are available for downloading at *http://www.trb.org.*

FMCSA may consider these four reports in its rulemaking and invites comment on their relevance to the NPRM.

FMCSA is reopening the comment period only for comments on these documents and their relationship to the proposed HOS regulations. Comments unrelated to the studies and/or to their relationship to the NPRM will not be evaluated.

Rulemaking Schedule

FMCSA advises the public of an adjustment to the rulemaking schedule agreed to in litigation before the U.S. Court of Appeals for the District of Columbia Circuit (Case No. 09–1094). Pursuant to an October 26, 2009, agreement between Public Citizen, *et al.* (Petitioners), and FMCSA, the Agency was to publish a final rule within 21 months of

the date of the settlement agreement. FMCSA will receive and analyze all comments to this notice before it completes its work on a final rule, however. This extra comment period will require additional time that was not envisioned in 2009, and thus the Agency will be unable to publish a final rule by July 26, 2011. FMCSA has advised Petitioners of this delay to the rulemaking schedule.

Issued on: May 3, 2011.

Anne S. Ferro,

Administrator.

[FR Doc. 2011–11150 Filed 5–6–11; 8:45 am]

BILLING CODE 4910–EX–P

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

49 CFR Chapter II

[Docket No. FRA–2011–0025]

Study on Protection of Certain Railroad Risk Reduction Data From Discovery or Use in Litigation

AGENCY: Federal Railroad Administration (FRA), Department of Transportation (DOT).

ACTION: Notice and request for public comment.

SUMMARY: In accordance with section 109 of the Rail Safety Improvement Act of 2008 (RSIA), FRA is soliciting public comment on the issue of whether it is in the public interest, including public safety and the legal rights of persons injured in railroad accidents, to withhold from discovery or use in litigation in a Federal or State court proceeding for damages involving personal injury or wrongful death against a carrier any report, survey, schedule, list, or data compiled or collected for the purpose of evaluating, planning, or implementing a railroad safety risk reduction program required under the RSIA, including a railroad carrier's analysis of its safety risks and its statement of the mitigation measures with which it will address those risks.

DATES: Comments should be received on or before July 8, 2011. Late-filed comments will be considered to the extent practicable.

ADDRESSES: You may submit comments to Docket No. FRA–2011–0025 by any of the following methods:

- *Federal e-Rulemaking Portal:* Go to *http://www.regulations.gov* and follow the instructions for sending your comments electronically.
- *Mail:* Docket Management Facility: U.S. Department of Transportation, 1200 New Jersey Avenue, SE., Washington, DC 20590–0001. If you submit comments by mail and would like to know that they reached the facility, please enclose a stamped, self-addressed envelope or postcard.
- *Hand Delivery or Courier:* West Building, Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC between 9 a.m. and 5 p.m. ET, Monday through Friday, except Federal holidays.
- *Fax:* 202–493–2251

To avoid duplication, please use only one of these four methods. All comments received will be posted without change to *http://www.regulations.gov* and will include any personal information you provide.

Docket: To read background documents or comments received, go to *http://www.regulations.gov* and click on the "read comments" box in the upper right hand side of the screen. Then, in the "Keyword" box, insert "FRA–2011–0025" and click "Search." Next, click the "Open Docket Folder" in the "Actions" column. Finally, in the "Title" column, click on the document you would like to review. If you do not have access to the Internet, you may view the docket online by visiting the Docket Management Facility in Room W12–140 on the ground floor of the Department of Transportation West Building, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m.,

Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Roberta Stewart, Trial Attorney, Office of Chief Counsel, FRA, 1200 New Jersey Avenue, SE., Room W33–411, Mail Stop 10, Washington, DC 20590 (telephone 202–493–6027), *roberta.stewart@dot.gov.*

SUPPLEMENTARY INFORMATION:

The Railroad Safety Improvement Act of 2008

Pursuant to section 103 of the Rail Safety Improvement Act of 2008 (Pub. L. 110–432, Div. A, or "RSIA") (codified at 49 U.S.C. 20156) and a delegation from the Secretary (49 CFR 1.49(oo) [1]), FRA is conducting rulemakings to issue rules by October 16, 2012 that would require the establishment of risk reduction programs by certain passenger and freight railroads. As part of these risk reduction programs, railroads would have to produce detailed analyses of the hazards and risks present in the railroad working environment in order to develop processes to eliminate these hazards and risks. In section 109 of the RSIA (codified at 49 U.S.C. 20118–20119), Congress determined that for these programs to be effective, the risk analyses must, subject to a few exceptions, be shielded from production in response to Freedom of Information Act (FOIA) requests.[2] *See* 49 U.S.C. 20118.

In lieu of including a statutory provision that would shield the risk analysis information from production and use in litigation, Congress mandated a study. In Section 109 of the RSIA, codified at 49 U.S.C. 20119, Congress directed FRA to evaluate whether it is in the public interest (including public safety and the legal rights of persons injured in railroad accidents) to withhold from discovery or admission into evidence in a Federal or State court proceeding for damages against a railroad carrier certain information compiled or collected for a safety risk reduction program required by FRA. 49 U.S.C. 20119(a). In conducting this study, FRA is required to solicit input from railroads, railroad non-profit employee labor organizations, railroad accident victims and their families, and the general public.

The Secretary has delegated the responsibility to carry out this provision to the Administrator of FRA. 49 CFR 1.49(oo). In accordance with section 109 of the RSIA, FRA is therefore issuing this notice to solicit public comments on whether it is in the public interest to protect railroad risk reduction information from production and use in litigation. Once the mandated study is completed, FRA may, if it is in the public interest, prescribe a rule to address the results of the study. Any such final rule would not become effective until one year after its adoption.

Section 109 of the RSIA specifically refers to public safety as a component of the public interest to be evaluated in the study. Comments received by FRA in response to its advance notice of proposed rulemaking (ANPRM) on a risk reduction program indicate that railroads are reluctant to participate in the development of a statutorily mandated risk reduction program rule and to provide comprehensive risk analyses that might be used against them in litigation. *See* 49 U.S.C. 20156 and 75 FR 76345 (December 8, 2010), Docket No. FRA–2009–0038. The purpose of shielding sensitive risk information from production in private litigation would be to encourage a railroad to describe its safety vulnerabilities, including its security vulnerabilities, and the mitigation measures it has identified with which it will address those risks, in documents that are not simply recitations of platitudes or pamphlets suitable for public relations campaigns but instead serious, comprehensive, and in-depth analyses. In other words, because railroads have indicated that they would be reluctant to produce comprehensive risk reduction analyses if they may be released in response to discovery requests or used in litigation, safety may be enhanced by prohibiting their release.

In addition to the public interest in railroad safety, section 109 of the RSIA also mentions specifically the legal rights and interests of persons injured in railroad accidents. There are numerous lawsuits each year against railroads that involve matters such as passenger train accidents, rail-highway grade crossing accidents, and railroad employee injuries. If the risk reduction information that would be generated and collected by the railroads under FRA's risk reduction programs were protected from discovery and use in these types of private lawsuits, another important question is whether private litigants would be disadvantaged by that protection.

Accordingly, FRA is soliciting comments on the following issues:

- Whether and how railroad safety and railroad risk reduction programs would be impacted if risk reduction information collected for these programs were discoverable and could be used in litigation; and
- Whether and how the legal rights of persons injured in railroad accidents would be impacted if railroad risk reduction program information were protected from discovery and use in litigation.

These specific questions are not intended to limit the comments; if there are other issues applicable to the protection of railroad risk information from use in litigation that commenters believe should be addressed, FRA invites a discussion of those issues.

Once the comment period has closed, FRA will evaluate, digest and summarize the comments. The public comments will then be used as part of a final study report to fulfill the requirements of 49 U.S.C. 20119 in determining whether it is in the public interest to protect railroad risk reduction information from discovery and use in litigation. If, based on the final study report, FRA were to conclude that it would be in the overall public interest to protect such information, FRA would then prepare and issue a notice of proposed rulemaking requesting public comment on draft regulations regarding limitations on the use of railroad risk information in litigation. The final study report will be made available to the public.

Supplemental Materials

To assist commenters in evaluating and discussing the issues at hand, FRA will place several items in the public docket for review.

First, FRA will put in the docket copies of the applicable statutes relating to the establishment of railroad risk reduction programs, the statutory protection of railroad risk reduction information from FOIA, and the statutory requirement for the study on the protection of railroad risk reduction information from discovery and use in litigation.

Second, FRA will put in the docket a copy of a report (produced by FRA's contractor for the study) that discusses existing Federal government programs, both within and outside of DOT, that protect similar types of risk information from use in litigation, and the

[1] "The Federal Railroad Administrator is delegated authority to: * * * (oo) Carry out the functions and exercise the authority vested in the Secretary by the Rail Safety Improvement Act of 2008 (Pub. L. 110–431, Div. A, 122 Stat. 4848)."

[2] If the information is "necessary for the Secretary of Transportation or another Federal agency to enforce or carry out any provision of Federal law" it may be disclosed. The Secretary may also disclose "any part of any record comprised of facts otherwise available to the public if * * * the Secretary determines that disclosure would be consistent with the confidentiality needed for that safety risk reduction or pilot program."

mechanisms by which that information is protected. The report provides an overview of the legal means by which certain types of information provided to the Federal government are protected from disclosure. Part II of the report identifies certain existing legal principles applicable to disclosure of information held by the Federal government, focusing on FOIA and the discovery process in Federal and State court litigation. Part III summarizes the RSIA's statutory requirements regarding the establishment of risk reduction programs, and summarizes FRA's actions to date to implement the RSIA's requirements. Parts IV and V provide an overview of a number of statutes and regulations that limit access to information submitted to DOT and other Federal government agencies. Within each Part, the report describes programs under which disclosure of safety-related information has been specifically limited by statute or regulation. The report also discusses programs that provide various degrees of protection for certain types of non-safety-related information.

Regulatory Notices

Privacy Act: Anyone is able to search the electronic form of any written communications and comments received into any of our dockets by the name of the individual submitting the document (or signing the document, if submitted on behalf of an association, business, labor union, *etc.*). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (Volume 65, Number 70, pages 19477–78) or online at *http://www.dot.gov/privacy.html*.

Issued in Washington, DC, on May 3, 2011.

Joseph C. Szabo,

Administrator, Federal Railroad Administration.

[FR Doc. 2011–11141 Filed 5–6–11; 8:45 am]

BILLING CODE 4910–06–P

Notices

Federal Register
Vol. 76, No. 89
Monday, May 9, 2011

This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

DEPARTMENT OF AGRICULTURE

Forest Service

Notice of Meeting

The Deschutes and Ochoco National Forests Resource Advisory Committee will meet on May 17, 2011 at the Central Oregon Intergovernmental Council building, main conference room, 2363 SW. Glacier Place, Redmond, Oregon. The meeting will begin at 8 a.m. and continue until 5 p.m. or until adjourned. Committee members will receive proposed natural resource projects that will be reviewed and recommended, discuss the Committee's project guidelines and decision making priorities, review and discuss reports related to the work of the Committee under Title II of the Secure Rural Schools and Community Self-Determination Act of 2000, as amended and reauthorized in 2008. All Deschutes and Ochoco National Forests Resource Advisory Committee meetings are open to the public. Interested citizens are welcome to attend.

John Allen,

Designated Federal Official, Deschutes National Forest Supervisor.

[FR Doc. 2011–11095 Filed 5–6–11; 8:45 am]

BILLING CODE 3410–11–M

DEPARTMENT OF COMMERCE

Submission for OMB Review; Comment Request

The Department of Commerce will submit to the Office of Management and Budget (OMB) for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35).

Agency: National Oceanic and Atmospheric Administration (NOAA).

Title: Profiles of Fish Processing Plants in Alaska (title shortened from the 60-day notice).

OMB Control Number: None.

Form Number(s): NA.

Type of Request: Regular submission (request for review of a new information collection).

Number of Respondents: 186.

Average Hours per Response: Initial and follow-up telephone calls, 6 minutes; surveys, 30 minutes.

Burden Hours: 95.

Needs and Uses: This request is for review of a new information collection.

Workers come from many places inside and outside Alaska to work seasonally in its fish processing facilities. As a result, the population of an Alaska community with a fish processing plant can increase significantly during peak processing seasons. However, very limited information is available in a consolidated location or format about these fish processing facilities. The National Marine Fisheries Service's Alaska Fisheries Science Center proposes to obtain such basic information, as an accurate number of individuals employed at each processing facility during the months of operation, the peak number of workers for processing various species by season, the ethnicity of processing workers, types of lodging and other accommodations and activities available for processing workers, whether or not the company provides meals for the processing workforce in a company galley, the interactions between seasonal processing workers and permanent residents of the community, and the history of the fish processing facility in the community. This type of information is important when attempting to forecast the possible social impacts of fishing regulations on communities which have an onshore fish processing facility.

This project would produce "processor profiles", short narrative descriptions of all the onshore fish processing plants in the state of Alaska that will augment and update existing community profiles.

Affected Public: Business or other for-profit organizations.

Frequency: One time.

Respondent's Obligation: Voluntary.

OMB Desk Officer: *OIRA_Submission@omb.eop.gov.*

Copies of the above information collection proposal can be obtained by calling or writing Diana Hynek, Departmental Paperwork Clearance Officer, (202) 482–0266, Department of Commerce, Room 6616, 14th and Constitution Avenue, NW., Washington, DC 20230 (or via the Internet at *dHynek@doc.gov*).

Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to *OIRA_Submission@omb.eop.gov.*

Dated: May 3, 2011.

Gwellnar Banks,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. 2011–11169 Filed 5–6–11; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

International Trade Administration

[C–570–971]

Multilayered Wood Flooring From the People's Republic of China: Alignment of Final Countervailing Duty Determination With Final Antidumping Duty Determination

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

SUMMARY: The Department of Commerce (the "Department") is aligning the final determination in this countervailing duty investigation of multilayered wood flooring ("wood flooring") from the People's Republic of China ("PRC") with the final determination in the companion antidumping duty investigation.

DATES: *Effective Date:* May 9, 2011.

FOR FURTHER INFORMATION CONTACT: Shane Subler, Matthew Jordan, Joshua Morris, or Patricia Tran, AD/CVD Operations, Office 1, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230; *telephone:* (202) 482–0189, (202) 482–1540, (202) 482–1779, or (202) 482–1503, respectively.

SUPPLEMENTARY INFORMATION:

Background

On November 18, 2010, the Department simultaneously initiated antidumping and countervailing duty investigations of wood flooring from the PRC. *See Multilayered Wood Flooring from the People's Republic of China: Initiation of Countervailing Duty Investigation,* 75 FR 70719 (November 18, 2010) and *Multilayered Wood Flooring From the People's Republic of China: Initiation of Antidumping Duty Investigation,* 75 FR 70714 (November 18, 2010).

On April 6, 2011, the Department published the preliminary affirmative countervailing duty determination pertaining to wood flooring from the PRC. *See Multilayered Wood Flooring From the People's Republic of China: Preliminary Affirmative Countervailing Duty Determination,* 76 FR 19034 (April 6, 2011). On April 4, 2011, the petitioner (the Coalition for American Hardwood Parity) requested alignment of the final countervailing duty determination with the final determination in the companion antidumping duty investigation of wood flooring from the PRC, in accordance with 19 CFR 351.210(b)(4)(i) and 19 CFR 351.210(i). This request was timely made.

Therefore, in accordance with section 705(a)(1) of the Tariff Act of 1930, as amended ("the Act"), and 19 CFR 351.210(b)(4), we are aligning the final countervailing duty determination of wood flooring from the PRC with the final determination in the companion antidumping duty investigation of wood flooring from the PRC. The final countervailing duty determination will be issued on the same date as the final antidumping duty determination, which is currently scheduled for August 2, 2011.

This notice is issued and published pursuant to section 705(a)(1) of the Act.

Dated: May 3, 2011.

Ronald K. Lorentzen,

Deputy Assistant Secretary for Import Administration.

[FR Doc. 2011–11254 Filed 5–6–11; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–933]

Frontseating Service Valves from the People's Republic of China: Preliminary Results of the 2008–2010 Antidumping Duty Administrative Review and Partial Rescission of Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

SUMMARY: In response to requests from interested parties, the Department of Commerce ("the Department") is conducting an administrative review of the antidumping duty order on frontseating service valves ("FSVs") from the People's Republic of China ("PRC"), covering the period October 22, 2008 through March 31, 2010.

We have preliminarily determined that the mandatory respondents in this administrative review have made sales in the United States at prices below normal value ("NV") during the period of review ("POR"). None of the remaining respondents provided evidence that they are separate from the state-controlled entity. As a result, they are considered part of the PRC entity. If these preliminary results are adopted in the final results of review, we will instruct U.S. Customs and Border Protection ("CBP") to assess antidumping duties on entries of subject merchandise during the POR for which the importer-specific assessment rates are above *de minimis.*

We invite interested parties to comment on these preliminary results. Parties who submit comments are requested to submit with each argument a summary of the argument. We intend to issue the final results no later than 120 days from the date of publication of this notice, pursuant to section 751(a)(3)(A) of the Tariff Act of 1930, as amended ("the Act").

DATES: *Effective Date:* May 9, 2011.

FOR FURTHER INFORMATION CONTACT: Laurel LaCivita, Sergio Balbontin, or Eugene Degnan, AD/CVD Operations, Office 8, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230; *telephone:* (202) 482–4243, (202) 482–6478, and (202) 482–0414, respectively.

Background

On April 28, 2009, the Department published in the **Federal Register** the antidumping duty order on FSVs from the PRC.[1] On April 1, 2010, the Department published in the **Federal Register** a notice of opportunity to request an administrative review of the antidumping duty order on FSVs from the PRC for the period October 22, 2008 through March 31, 2010.[2] On April 28, 2010, in accordance with 19 CFR 351.213(b)(2), Zhejiang Sanhua Co., Ltd. ("Sanhua"), a foreign exporter of the subject merchandise, requested the Department to review its sales of subject merchandise. On April 30, 2010, Parker-Hannifin Corporation ("Petitioner") requested that the Department conduct an administrative review of the exports of subject merchandise of 97 exporters and producers of the subject merchandise.[3] On the same date, Zhejiang DunAn Hetian Metal Co. Ltd. ("DunAn"), a foreign exporter of the subject merchandise, requested the Department to review its sales of subject merchandise. On May 28, 2010, the Department initiated an administrative review of the order on FSVs from the PRC for the POR with respect to 97 producers and exporters of the subject merchandise.[4]

On June 25, 2010, Tycon Alloy Industries (Shenzhen) Co., Ltd. ("Tycon Alloy") reported that it had no shipments of subject merchandise and requested that the Department rescind the review with respect to it. On July 26, 2010, Amtek/CAG, Inc., an exporter of the subject merchandise, entered its appearance in this review and withdrew its appearance on August 5, 2010.

On August 13, 2010, the Department selected two mandatory respondents for this administrative review: Sanhua and DunAn. See the Respondent Selection section below.

Between August 2010 and February 2011, the Department issued its initial and supplemental antidumping duty questionnaires to the two mandatory respondents in this review, DunAn and Sanhua.[5] DunAn and Sanhua submitted their responses between September 2010 and March 2011, and Petitioner

[1] *See Antidumping Duty Order: Frontseating Service Valves from the People's Republic of China,* 74 FR 19196 (April 28, 2009) ("*Order*").

[2] *See Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity To Request Administrative Review,* 75 FR 16426 (April 1, 2010).

[3] *See* Letter from Petitioners, "Frontseating Service Valves from the People's Republic of China—Request for Initiation of Antidumping Administrative Review," dated April 30, 2010, at Attachment A.

[4] *See Initiation of Antidumping and Countervailing Duty Administrative Reviews,* 75 FR 29976 (May 28, 2010) ("*Initiation*").

[5] *See* the "Respondent Selection" section of this notice below.

responded with comments in November 2010 and April 2011.

On July 8, 2010, the Department requested that Import Administration's Office of Policy provide a list of surrogate countries for this review.[6] On July 20, 2010, the Office of Policy issued its list of surrogate countries.[7] On October 22, 2010, the Department issued a letter to interested parties seeking comments on surrogate country selection and surrogate values ("SVs").[8] On November 4 and 5, 2010, Petitioners, DunAn and Sanhua provided surrogate country selection comments ("Petitioners' Surrogate Country Selection Letter," "DunAn's Surrogate Country Selection Letter" and "Sanhua's Surrogate Country Selection Letter," respectively). DunAn and Sanhua submitted SV comments ("DunAn's SV Comments" and "Sanhua's SV Comments," respectively). On November 29, 2010, Petitioner submitted rebuttal SV comments ("Petitioners' Rebuttal SV Comments").

On January 7, 2011, the Department extended the time period for completion of the preliminary results of this review by 120 days until May 2, 2011.[9]

Respondent Selection

Section 777A(c)(1) of the Act directs the Department to calculate individual dumping margins for each known exporter or producer of the subject merchandise. However, section 777A(c)(2) of the Act gives the Department discretion to limit its examination to a reasonable number of exporters or producers if it is not practicable to examine all exporters or producers involved in the review.

On June 2, 2010, the Department released CBP data for entries of the subject merchandise during the POR under administrative protective order ("APO") to all interested parties having an APO, inviting comments regarding the CBP data and respondent selection. The Department received comments and rebuttal comments on June 14, 2010, and June 17, 2010, from Petitioners and Sanhua, respectively. On July 1, 2010, the Department released revised CBP data to all parties under APO. Petitioners and DunAn provided comments on this data on July 8, 2010.

On August 13, 2010, the Department issued its Respondent Selection Memorandum after assessing its resources and determining that it could reasonably examine two exporters subject to this review. Pursuant to section 777A(c)(2)(B) of the Act, the Department selected DunAn and Sanhua as mandatory respondents.[10]

Period of Review

The POR is October 22, 2008 through March 31, 2010.

Scope of the Order

The merchandise covered by this order is frontseating service valves, assembled or unassembled, complete or incomplete, and certain parts thereof. Frontseating service valves contain a sealing surface on the front side of the valve stem that allows the indoor unit or outdoor unit to be isolated from the refrigerant stream when the air conditioning or refrigeration unit is being serviced. Frontseating service valves rely on an elastomer seal when the stem cap is removed for servicing and the stem cap metal to metal seat to create this seal to the atmosphere during normal operation.[11]

For purposes of the scope, the term "unassembled" frontseating service valve means a brazed subassembly requiring any one or more of the following processes: the insertion of a valve core pin, the insertion of a valve stem and/or O ring, the application or installation of a stem cap, charge port cap or tube dust cap. The term "complete" frontseating service valve means a product sold ready for installation into an air conditioning or refrigeration unit. The term "incomplete" frontseating service valve means a product that when sold is in multiple pieces, sections, subassemblies or components and is incapable of being installed into an air conditioning or refrigeration unit as a single, unified valve without further assembly.

The major parts or components of frontseating service valves intended to be covered by the scope under the term "certain parts thereof" are any brazed subassembly consisting of any two or more of the following components: a valve body, field connection tube, factory connection tube or valve charge port. The valve body is a rectangular block, or brass forging, machined to be hollow in the interior, with a generally square shaped seat (bottom of body). The field connection tube and factory connection tube consist of copper or other metallic tubing, cut to length, shaped and brazed to the valve body in order to create two ports, the factory connection tube and the field connection tube, each on opposite sides of the valve assembly body. The valve charge port is a service port via which a hose connection can be used to charge or evacuate the refrigerant medium or to monitor the system pressure for diagnostic purposes.

The scope includes frontseating service valves of any size, configuration, material composition or connection type. Frontseating service valves are classified under subheading 8481.80.1095, and also have been classified under subheading 8415.90.80.85, of the Harmonized Tariff Schedule of the United States ("HTSUS"). It is possible for frontseating service valves to be manufactured out of primary materials other than copper and brass, in which case they would be classified under HTSUS subheadings 8481.80.3040, 8481.80.3090, or 8481.80.5090. In addition, if unassembled or incomplete frontseating service valves are imported, the various parts or components would be classified under HTSUS subheadings 8481.90.1000, 8481.90.3000, or 8481.90.5000. The HTSUS subheadings are provided for convenience and customs purposes, but the written description of the scope of this proceeding is dispositive.

Partial Rescission of Administrative Review

The Department is rescinding this review with respect to Tycon Alloy because it submitted a "no shipment" letter on June 25, 2010, and our review of the CBP import data did not reveal any contradictory information.[12] [13]

[6] *See* Memorandum to Carole Showers, Director, Office of Policy, "Antidumping Duty Administrative Review of Frontseating Service Valves from the People's Republic of China: Surrogate-Country Selection," dated July 8, 2010.

[7] *See* Memorandum from Carole Showers, Acting Director, Office of Policy, "Request for a List of Surrogate Countries for an Administrative Review of the Antidumping Duty Order on Frontseating Service Valves ("Service Valves") from the People's Republic of China ("PRC")," dated July 20, 2010 ("Surrogate Country List").

[8] *See* Letter to Interested Parties, "First Administrative Review of the Antidumping Duty Order on Front Seating Valves from the People's Republic of China: Request for Comments on the Selection of a Surrogate Country and Surrogate Values," dated October 22, 2010.

[9] *See Frontseating Service Valves from the People's Republic of China: Extension of Time for the Preliminary Results of the Antidumping Duty Administrative Review,* 76 FR 1135 (January 7, 2011).

[10] *See* Memorandum regarding Antidumping Duty Administrative Review of Frontseating Service Valves from the People's Republic of China: Selection of Mandatory Respondents, dated August 13, 2010 ("Respondent Selection Memorandum").

[11] The frontseating service valve differs from a backseating service valve in that a backseating service valve has two sealing surfaces on the valve stem. This difference typically incorporates a valve stem on a backseating service valve to be machined of steel, where a frontseating service valve has a brass stem. The backseating service valve dual stem seal (on the back side of the stem), creates a metal to metal seal when the valve is in the open position, thus, sealing the stem from the atmosphere.

[12] *See* letter from Tycon Alloy, "Frontseating Service Valves from the People's Republic of China: Request for Rescission of the Administration

Continued

Non-Market Economy Country Status

The Department has treated the PRC as a non-market economy ("NME") country in all past antidumping duty investigations and administrative reviews and continues to do so in this case.[14] The Department has previously examined the PRC's market-economy ("ME") status and determined that NME status should continue for the PRC.[15] In accordance with section 771(18)(C)(i) of the Act, any determination that a foreign country is an NME country shall remain in effect until revoked by the administering authority. No interested party to this proceeding has contested such treatment. Accordingly, we calculated NV using a factors of production ("FOP") methodology in accordance with section 773(c) of the Act, which applies to NME countries.

Surrogate Country

When the Department is investigating imports from an NME country, section 773(c)(1) of the Act directs it to base NV on the NME producer's FOPs. The Act further instructs that valuation of the FOPs shall be based on the best available information in a surrogate ME country or countries considered to be appropriate by the Department.[16] When valuing the FOPs, the Department shall utilize, to the extent possible, the prices or costs of FOPs in one or more ME countries that are: (1) At a level of economic development comparable to that of the NME country; and (2) significant producers of comparable merchandise.[17] Further, the Department normally values all FOPs in a single surrogate country.[18] The sources of SVs are discussed under the "Normal Value" section below and in the Factor Valuation Memorandum,[19] which is on file in the Central Records Unit, Room 7046 of the main Department building.

In examining which country to select as its primary surrogate country for this proceeding, the Department first determined that India, the Philippines, Indonesia, Thailand, Ukraine and Peru are countries comparable to the PRC in terms of economic development.[20] Petitioner, DunAn and Sanhua each submitted letters asserting that India is the most appropriate surrogate country because: (1) India is at a level of economic development comparable to the PRC; (2) India is a significant producer of comparable merchandise; and, (3) India has the most reliable, nationally published, publicly available data with which to value the FOPs used to produce the subject merchandise.[21]

After evaluating interested parties' comments, the Department has determined that India is the appropriate surrogate country to use in this review in accordance with section 773(c)(4) of the Act. The Department based its decision on the following facts: (1) India is at a level of economic development comparable to that of the PRC; (2) India is a significant producer of comparable merchandise; and (3) India provides the best opportunity to use quality, publicly available data to value the FOPs. All the data submitted by Petitioner, DunAn and Sanhua for our consideration as potential SVs and surrogate financial ratios are sourced from India. Finally, on the record of this review, we have usable SV data (including financial data) from India, but no such surrogate data from other potential surrogate country.

Therefore, because India best represents the experience of producers of comparable merchandise operating in a surrogate country, we have selected India as the surrogate country and, accordingly, have calculated NV using Indian prices to value DunAn's and Sanhua's FOPs, when available and appropriate. We have obtained and relied upon publicly available information wherever possible.

In accordance with 19 CFR 351.301(c)(3)(ii), interested parties may submit publicly available information to value the FOPs within 20 days after the date of publication of the preliminary results of review.[22]

Separate Rates

A designation of a country as an NME remains in effect until it is revoked by the Department.[23] In proceedings involving NME countries, the Department has a rebuttable presumption that all companies within the country are subject to government control and thus should be assessed a single antidumping duty rate.[24]

In the *Initiation,* the Department notified parties of the application and certification process by which exporters may obtain separate rate status in NME proceedings.[25] It is the Department's policy to assign all exporters of subject merchandise in an NME country a single rate unless an exporter can demonstrate that it is sufficiently independent so as to be entitled to a separate rate. Exporters can demonstrate this independence through the absence of both *de jure* and *de facto* governmental control over export activities. The Department analyzes each entity exporting the subject merchandise under a test arising from the *Final Determination of Sales at Less Than Fair Value: Sparklers From the People's Republic of China,* 56 FR 20588 (May 6, 1991) ("Sparklers"), as further developed in Notice of *Final Determination of Sales at Less Than Fair Value: Silicon Carbide From the People's Republic of China,* 59 FR 22585 (May 2, 1994) ("*Silicon Carbide*"). However, if the Department determines that a company is wholly foreign-owned or located in a market economy, then a separate rate analysis is not necessary to

Review," dated June 25, 2010. *See* also Memorandum to the File, "Frontseating Service Valves from the People's Republic of China: Customs Data for Respondent Selection Concerning U.S. Imports of Front Seating Valves," dated July 1, 2010.

[13] *See* "No Shipments Inquiry Re: Front Seating Service Valves From The People's Republic Of China (A–570–933)," dated April 6, 2011.

[14] *See* 771(18)(C) of the Act; see also, *e.g.,* Pure *Magnesium from the People's Republic of China: Final Results of Antidumping Duty Administrative Review,* 73 FR 76336 (December 16, 2008); and *Frontseating Service Valves From the People's Republic of China: Final Determination of Sales at Less Than Fair Value and Final Negative Determination of Critical Circumstances,* 74 FR 10886 (March 13, 2009).

[15] *See* Memorandum from the Office of Policy to David M. Spooner, Assistant Secretary for Import Administration, "The People's Republic of China (PRC) Status as a Non-Market Economy (NME)," dated May 15, 2006. This document is available online at *http://ia.ita.doc.gov/download/prc-nme-status/prc-nme-status-memo.pdf.*

[16] *See* section 773(c)(1) of the Act.

[17] *See* section 773(c)(4) of the Act.

[18] *See* 19 CFR 351.408(c)(2).

[19] *See* Memorandum to the File, "2008–2009 Administrative Review of the Antidumping Duty Order on FSVs from the People's Republic of China: Factor Valuation Memorandum for the Preliminary Results," dated May 2, 2011 ("Factor Valuation Memorandum").

[20] *See* Surrogate Country List.

[21] *See* Petitioner's Surrogate Country Selection Letter at 2; DunAn's Surrogate Country Selection Letter at 2; and, Sanhua's Surrogate Country Selection Letter at 3–5.

[22] In accordance with 19 CFR 351.301(c)(1), for the final determination of this review, interested parties may submit factual information to rebut, clarify, or correct factual information submitted by an interested party less than ten days before, on, or after the applicable deadline for submission of such factual information. However, the Department notes that 19 CFR 351.301(c)(1) permits new information only insofar as it rebuts, clarifies, or corrects information recently placed on the record. The Department generally cannot accept the submission of additional, previously absent-from-the-record alternative SV information pursuant to 19 CFR 351.301(c)(1). *See Glycine from the People's Republic of China: Final Results of Antidumping Duty Administrative Review and Final Rescission, in Part,* 72 FR 58809 (October 17, 2007), and accompanying Issues and Decision Memorandum at Comment 2.

[23] *See* section 771(18)(C) of the Act.

[24] *See Notice of Final Determination of Sales at Less Than Fair Value, and Affirmative Critical Circumstances, In Part: Certain Lined Paper Products From the People's Republic of China, 71 FR 53079 (September 8, 2006) ("Lined Paper from the PRC"); Final Determination of Sales at Less Than Fair Value and Final Partial Affirmative Determination of Critical Circumstances: Diamond Sawblades and Parts Thereof From the People's Republic of China,* 71 FR 29303 (May 22, 2006).

[25] *See Initiation,* 75 FR at 29977.

determine whether it is independent from government control.[26]

Separate Rate Recipients

In this administrative review, Sanhua submitted its separate rate certification on July 27, 2010.[27] DunAn submitted its separate rate certification in its Section A Questionnaire response ("DunAn's AQR").[28] DunAn and Sanhua each reported that they are wholly Chinese-owned companies.[29] Therefore, the Department must analyze whether they can demonstrate the absence of both *de jure* and *de facto* government control over export activities.

PRC–Wide Entity

Except for Sanhua, DunAn, and Tycon Alloy, none of the other 94 companies upon which the Department initiated an administrative review submitted a separate-rate application, a separate-rate certification, or a certification of no shipments. As such, they have not demonstrated their eligibility for separate rate status nor provided evidence of no-shipments during the POR. Therefore, the Department preliminarily determines that these companies belong to the PRC-wide entity.[30] Furthermore, CBP data indicates that there were exports from China of subject merchandise which is not attributable to the two mandatory respondents, and, therefore, the Department preliminarily determines that the PRC-wide entity exported subject merchandise to the United States during the POR. The PRC-wide entity is thus assigned a single antidumping duty rate distinct from the separate rate(s) determined for companies that are found to be independent of government control with respect to their export activities. The Department considers the influence that the government has been found to have over the economy to warrant determining a rate for the PRC-wide entity that is distinct from the rates found for companies that have provided sufficient evidence to establish that they operate freely with respect to their export activities.[31] We are preliminarily assigning to the PRC-wide entity its current rate of 55.62 percent.

a. Absence of De Jure Control

The Department considers the following *de jure* criteria in determining whether an individual company may be granted a separate rate: (1) An absence of restrictive stipulations associated with an individual exporter's business and export licenses; (2) any legislative enactments decentralizing control of companies; and (3) other formal measures by the government decentralizing control of companies.[32]

The evidence provided by DunAn and Sanhua supports a preliminary finding of *de jure* absence of government control based on the following: (1) An absence of restrictive stipulations associated with their businesses and export licenses; (2) applicable legislative enactments decentralizing control of companies; and (3) formal measures by the government decentralizing control of companies.[33]

b. Absence of De Facto Control

Typically, the Department considers four factors in evaluating whether each respondent is subject to de facto government control of its export functions: (1) Whether the export prices are set by or are subject to the approval of a government agency; (2) whether the respondent has authority to negotiate and sign contracts and other agreements; (3) whether the respondent has autonomy from the government in making decisions regarding the selection of management; and (4) whether the respondent retains the proceeds of its export sales and makes independent decisions regarding disposition of profits or financing of losses.[34] The Department has determined that an analysis of *de facto* control is critical in determining whether respondents are, in fact, subject to a degree of governmental control, which would preclude the Department from assigning separate rates.

The evidence provided by DunAn and Sanhua supports a preliminary finding of *de facto* absence of government control based on the following: (1) The absence of evidence that the export prices are set by or are subject to the approval of a government agency; [35] (2) the respondents have authority to negotiate and sign contracts and other agreements; [36] (3) the respondents have autonomy from the government in

[26] *See, e.g., Final Results of Antidumping Duty Administrative Review: Petroleum Wax Candles From the People's Republic of China,* 72 FR 52355, 52356 (September 13, 2007).

[27] *See* Sanhua's letter, "Certain Frontseating Service Valves from the People's Republic of China; A–570–933; Separate Rate Certification of Zhejiang Sanhua Co., Ltd.," dated July 27, 2010.

[28] *See* DunAn's AQR at 2–13 *and* DunAn's letter, "DunAn's Comments on Absence of Separate Rate Certification: Administrative Review of the Antidumping Order on Fronseating Service Valves from the People's Republic of China," dated August 4, 2010.

[29] *See* DunAn's AQR at 13–19 and Sanhua's Section A Questionnaire Response ("Sanhua's AQR") at 1–3.

[30] The names of the companies are: AMTEK/CAG Inc.; Anhui Technology Imp Exp Co., Ltd.; Anhui Yingliu Casting Industrial Co.; Anhui Yingliu Electromechanical Co.; Ningbo Weitao Electrical Appliance Co., Ltd.; Atico International (Asia) Ltd.; Beijing KJL Int'l Cargo Agent Co., Ltd.; Bergstrom China Group; Bowen Casting Co Ltd; Broad-Ocean Motor (Hong Kong) Co., Ltd.; C.H. Robinson Worldwide Logistics (Dalian) Co., Ltd.; Catic Fujian Co., Ltd.; Ceiec International Electronics Service Company; Changzhou Ranco Reversing Valve Co., Ltd.; Changzhou Regal-Beloit Motor Co., Ltd.; Chian International Electronics A; China National Building Materials & Equipment Imp & Exp Corp; Chongqing Jianshe Automobile; Zhonghuan Mach. Factory; CPI Motor Co.; Dongyou International Co., Ltd.; Egelhof Regelungstechnik (Suzhou); Fujitsui General (Shanghai) Co., Ltd.; Gamela Enterprise Co Ltd; GD Midea Air-Conditioning Equipment Co Ltd.; Global PMX Co. Ltd; Globe Express Services-NGB; Grace Meng; Guangdong Sanyo Air Conditioner Co., Ltd.; Guangzhou Lai-Long Co, Ltd; Hang Ji Industries International Co; Hangzhou Chunjiang Valve Corporation; Headwin Logistics Co., Ltd.; Higher Hardware Co., Limited; Jiangsu Wei Xi Group Co.; Jiashan Sinhai Precision Casting Co., Ltd.; Leyuan Kuo Enterprise Co Ltd; LHMW Investment Corporation; Long Quan Heng Feng Auto Air Accessories Co., Ltd.; Long Term Elec Co. Ltd; Nantong Bochuang Fine Ceramic Co. Ltd.; Netmotor (Mfg.) Ltd.; New Centurion Import Export Ltd.; Ningbo Chindr Industry Co., Ltd.; Ningbo Gime Bicycle Co. Ltd.; Ningbo IDC Int'l Trading Co., Ltd; Ningbo Kaiyuan Shipping Co., Ltd.; Ningbo ND Imp. Exp Co., Ltd.; Ningbo Riyue Refri. Equip. Co., Ltd.; Ningbo Silvertie Foreign Economic Trading Corp.; Ningbo Waywell International Co., Ltd.; Ningbo Yinzhou Along Imp Exp Co.; On Time Taiwan Ltd.; Orient Refrigeration Group Ltd.; Pan Pacific Express Corp.; Promac Intl Corp. No 35; Shanghai Haitai Precision Machine Co., Ltd.; Shanghai Highly Group Trading Co., Ltd.; Shanghai Huan Long Im Ex Co. Ltd.; Shanghai Jing HE Worked Trade Ltd.; Shanghai Research Institute OF; Shanghai Sitico International Trading Co.; Shanghai Velle Automobile Air; Shenyang Henyi Enterprise Co., Ltd.; Shenzhen Heg Import and Export Co., ltd.; Shenzhen Pacific-Net Logistics, Ltd.; Summit International Logistics, Ltd.; Suzhou KF Valve Co., Ltd.; Suzhou Samsung Electronic Co., Ltd.; Taizhou Boxin Imp Exp Co., Ltd.; Taizhou Chen's Copper Co., Ltd.; Taizhou DBW Metal Pipe Fittings Co., Ltd.; Traffic Tech International Freight; Uniauto Co., Ltd.; Uniauto International Limited; Uniauto International Ltd.; Uniauto Intl Ltd; WDI (Xiamen) Technology Inc.; Weiss-Rohlig China Co., Ltd.; Wudi County Import and Export Corp.; Xiamen Chengeng Auto Parts Supplier Co., Ltd.; Yancheng H&M Pressure Valve; York International (Northern Asia) Ltd.; Yuyao Dianbo Machinery Co., Ltd.; Yuyao Shule Air Conditioning Equipment Co., Ltd.; Yuyao Smart Mold Plastic Co Ltd; Zhejiang Delisai Air Conditioner Co., Ltd.; Zhejiang Friendship Valve Co., Ltd.; Zhejiang Pinghu Foreign Trade; Zhejiang Sanhua Climate and Appliance Controls Group Co., Ltd.; Zhejiang Sanrong Refrigeration; Zhejiang Tongxiang; Zhejiang Yili Automobile Air Condition Co., Ltd.; and Zhejiang Yilida Ventilator Co., Ltd.

[31] *See* Certain Frozen Warmwater Shrimp From the People's Republic of China: Preliminary Results and Preliminary Partial Rescission of Fifth Antidumping Duty Administrative Review, 76 FR 8338, 8342 (February 14, 2011).

[32] *See Sparklers,* 56 FR at 20589.

[33] *See* Foreign Trade Law of the People's Republic of China, contained in Sanhua's AQR, at Exhibit A–2. *See* also DunAn's AQR at 3–4.

[34] *See Silicon Carbide,* 59 FR at 22587; see also *Notice of Final Determination of Sales at Less Than Fair Value: Furfuryl Alcohol From the People's Republic of China,* 60 FR 22544, 22545 (May 8, 1995).

[35] *See* DunAn's AQR, at 8–9, Sanhua's AQR, at 7–10 and Exhibit A–5, *and* Sanhua's first supplemental questionnaire response ("Sanhua's 1st SQR") at 2 and Exhibit SA–2.

[36] *See* DunAn's AQR, at 8–9 and Sanhua's AQR, at 9.

making decisions regarding the selection of management; [37] and (4) the respondents retain the proceeds of their export sales and make independent decisions regarding disposition of profits or financing of losses.[38]

Therefore, the evidence placed on the record of this review by DunAn and Sanhua demonstrates an absence of *de jure* and *de facto* government control with respect to DunAn's and Sanhua's exports of the merchandise under review, in accordance with the criteria identified in *Sparklers* and *Silicon Carbide.* Accordingly, we have determined that DunAn and Sanhua have demonstrated their eligibility for separate rates.

Fair Value Comparisons

To determine whether sales of FSVs to the United States by DunAn and Sanhua were made at prices below NV, we compared constructed export price ("CEP") to NV, as described in the "Constructed Export Price" and "Normal Value" sections of this notice.

Constructed Export Price

In accordance with section 772(b) of the Act, CEP is the price at which the subject merchandise is first sold (or agreed to be sold) in the United States before or after the date of importation by or for the account of the producer or exporter of such merchandise or by a seller affiliated with the producer or exporter, to a purchaser not affiliated with the producer or exporter, as adjusted under sections 772(c) and (d) of the Act. In accordance with section 772(b) of the Act, we used CEP for DunAn's and Sanhua's sales because the sales were made by U.S. affiliates in the United States.

We calculated CEP based on delivered prices to unaffiliated purchasers in the United States. We made adjustments to the reported gross unit prices for billing adjustments to arrive at the price at which the subject merchandise is first sold in the United States to an unaffiliated customer. We made deductions from the U.S. sales price for movement expenses in accordance with section 772(c)(2) of the Act. These included, where applicable, foreign inland freight from plant to the port of exportation, foreign brokerage and handling, ocean freight, marine insurance, U.S. inland freight from port to the warehouse, U.S. freight from warehouse to customer, U.S. warehousing, U.S. customs duty, and U.S. brokerage and handling. In accordance with section 772(d)(1) of the Act, the Department deducted, where applicable, commissions, credit expenses, inventory carrying costs, and indirect selling expenses from the U.S. price, all of which relate to commercial activity in the United States. In accordance with section 772(d) of the Act, we calculated DunAn's and Sanhua's credit expenses and inventory carrying costs based on each company's respective short-term interest rate. In addition, we deducted CEP profit in accordance with sections 772(d)(3) and 772(f) of the Act.[39]

Normal Value

Section 773(c)(1) of the Act provides that the Department shall determine NV using a factors of production methodology if the merchandise is exported from an NME country and the Department finds that the available information does not permit the calculation of NV using home-market prices, third-country prices, or constructed value under section 773(a) of the Act. When determining NV in an NME context, the Department will base NV on FOPs because the presence of government controls on various aspects of these economies renders price comparisons and the calculation of production costs invalid under our normal methodologies. The Department's questionnaire requires that DunAn and Sanhua each provide information regarding the weighted-average FOPs across all of the company's plants and/or suppliers that produce the subject merchandise, not just the FOPs from a single plant or supplier. This methodology ensures that the Department's calculations are as accurate as possible.[40]

In accordance with 19 CFR 351.408(c)(1), the Department will normally use publicly available information to find an appropriate SV to value FOPs, but when a producer sources an input from a ME and pays for it in ME currency, the Department may value the factor using the actual price paid for the input.[41] DunAn and Sanhua each reported that they did not purchase inputs from ME suppliers for the production of the subject merchandise.[42]

We calculated NV based on FOPs in accordance with section 773(c)(3) and (4) of the Act and 19 CFR 351.408(c). The FOPs include but are not limited to: (1) Hours of labor required; (2) quantities of raw materials employed; (3) amounts of energy and other utilities consumed; and (4) representative capital costs. The Department used FOPs reported by DunAn and Sanhua for materials, energy, labor, by-products, and packing.

DunAn reported the FOPs of certain unaffiliated third parties and requested that the Department value recycled brass bar, an intermediate input to the production of FSVs, using these FOPs. The Department sought additional information in a supplemental questionnaire regarding these FOPs, but finds that DunAn's reply does not sufficiently address the deficiencies on the record regarding this issue.[43] Therefore, for the preliminary results, the Department is valuing the recycled brass bars reported by DunAn using a surrogate value for brass bar. The Department, however, expects to release an additional supplemental questionnaire addressing this issue, and to consider the response to that questionnaire when addressing this issue for the final results.

DunAn and Sanhua separately reported that they each generate brass scrap during the production process of subject merchandise.[44] DunAn and Sanhua each requested a by-product offset for brass scrap. Sanhua established that it sold all of the scrap that it produced during the POR. Therefore, for these preliminary results, we have granted Sanhua a by-product offset for scrap because it demonstrated that there is commercial value to this scrap.[45] DunAn also established commercial value for its scrap by demonstrating that it sold a portion of the scrap that it produced during the

[37] *See* DunAn's AQR, at 10–11 and Sanhua's AQR, at 9.

[38] *See* DunAn's AQR, at 11 and Sanhua's AQR, at 10–11.

[39] For a detailed description of all adjustments, see Memorandum titled "Frontseating Service Valves from the People's Republic of China: Analysis Memorandum for the Preliminary Results of the 2008–2010 Administrative Review: Zhejiang DunAn Hetian Metal Co. Ltd.," ("DunAn Preliminary Analysis Memorandum"), dated May 2, 2011; and, "Frontseating Service Valves ("FSVs") from the People's Republic of China ("PRC"): Analysis Memorandum for the Preliminary Results of the 2008–2010 Administrative Review: Zhejiang Sanhua Co., Ltd. ("Sanhua")," ("Sanhua Preliminary Analysis Memorandum"), dated May 2, 2011.

[40] *See, e.g., Final Determination of Sales at Less Than Fair Value and Critical Circumstances: Certain Malleable Iron Pipe Fittings From the People's Republic of China,* 68 FR 61395 (October 28, 2003), and accompanying Issue and Decision Memorandum at Comment 19.

[41] *See* 19 CFR 351.408(c)(1); see *also Shakeproof Assembly Components, Div. of Ill. Tool Works, Inc. v. United States,* 268 F.3d 1376, 1382–1383 (Fed. Cir. 2001) (affirming the Department's use of market-based prices to value certain FOPs).

[42] *See* DunAn's Section D Questionnaire response ("DunAn's DQR") at D–9 *and* Sanhua's Section D Questionnaire response ("Sanhua's DQR") at D–8.

[43] *See* DunAn's March 15, 2011 Section D supplemental questionnaire response.

[44] *See* DunAn's DQR at D–20 *and* Sanhua's DQR at pages D–16—D–18, and Exhibit D–10a–e.

[45] *See* Sanhua's Preliminary Analysis Memorandum.

POR, and provided the remaining scrap to unaffiliated processors for production into recycled bar. Accordingly, we have granted DunAn a by-product offset for its brass scrap generated during production during the POR.[46]

Factor Valuations

In accordance with section 773(c) of the Act, the Department calculated NV based on FOPs reported by DunAn and Sanhua for the POR. To calculate NV, the Department multiplied the reported per-unit factor consumption quantities by publicly available Indian SVs. In selecting the SVs, the Department considered the quality, specificity, and contemporaneity of the data. The Department adjusted input prices by including freight costs to make them delivered prices, as appropriate. Specifically, the Department added to Indian import values a surrogate for freight cost using the shorter of the reported distance from the domestic supplier to the factory or the distance from the nearest seaport to the factory. This adjustment is in accordance with the decision of the U.S. Court of Appeals for the Federal Circuit in *Sigma Corp.* v. *United State*s, 117 F.3d 1401, 1407–08 (Fed. Cir. 1997). A detailed description of all SVs used to value DunAn's and Sanhua's reported FOPs may be found in the Factor Valuation Memorandum.

For the preliminary results, in accordance with the Department's practice, except where noted below, we used data from the Indian import statistics in the Global Trade Atlas ("GTA") and other publicly available Indian sources in order to calculate SVs for DunAn and Sanhua's FOPs (*i.e.,* direct materials, energy, and packing materials) and certain movement expenses. In selecting the best available information for valuing FOPs in accordance with section 773(c)(1) of the Act, the Department's practice is to select, to the extent practicable, SVs which are non-export average values, most contemporaneous with the POR, product-specific, and tax-exclusive.[47] The record shows that data in the Indian import statistics, as well as those from the other Indian sources, are contemporaneous with the POR, product-specific, and tax-exclusive.[48] In those instances where we could not obtain publicly available information contemporaneous to the POR with which to value factors, we adjusted the SVs using, where appropriate, the Indian Wholesale Price Index ("WPI") as published in the International Monetary Fund's *International Financial Statistics.*[49]

Furthermore, with regard to Indian import-based SVs, we have disregarded prices that we have reason to believe or suspect may be subsidized, such as those from Indonesia, South Korea, and Thailand. We have found in other proceedings that these countries maintain broadly available, non-industry-specific export subsidies and, therefore, it is reasonable to infer that all exports to all markets from these countries may be subsidized.[50] We are also guided by the statute's legislative history that explains that it is not necessary to conduct a formal investigation to ensure that such prices are not subsidized.[51] Rather, the Department was instructed by Congress to base its decision on information that is available to it at the time it is making its determination. In accordance with the foregoing, we have not used prices from these countries in calculating the Indian import-based SVs.

We used *Chemical Weekly* prices to value nitric acid and hydrochloric acid for these preliminary results. We have determined *Chemical Weekly* represents the best data source to value these chemicals because *Chemical Weekly* specifies the concentration level of this chemical input, while the GTA data do not include this information. Therefore, because DunAn reported the purity level of these inputs, we find that Chemical Weekly data are more specific to the inputs.

We used Indian transport information to value the inland freight cost of the raw materials. The Department determined the best available information for valuing truck freight to be from the following Web site: *http://www.infobanc.com/logistics/logtruck.htm.* The logistics section of this source contains inland truck freight rates from four major points of origin to 25 destinations in India. The Department obtained inland truck freight rates for the POR from each point of origin to each destination and averaged the data accordingly. Since this value is contemporaneous with the POR, we made no adjustments for inflation.[52]

On May 14, 2010, the Court of Appeals for the Federal Circuit ("CAFC") in *Dorbest Ltd.* v. *United States,* 604 F.3d 1363, 1372 (CAFC 2010) ("*Dorbest IV*"), found that the "{regression-based} method for calculating wage rates {as stipulated by 19 CFR 351.408(c)(3)} uses data not permitted by {the statutory requirements laid out in section 773 of the Act (i.e., 19 U.S.C. 1677b(c))}." The Department is continuing to evaluate options for determining labor values in light of the recent CAFC decision. However, for these preliminary results, we have calculated an hourly wage rate to use in valuing respondents' reported labor input by averaging industry-specific earnings and/or wages in countries that are economically comparable to the PRC and that are significant producers of comparable merchandise.

For the preliminary results of this administrative review, the Department is valuing labor using a simple-average, industry-specific wage rate using earnings or wage data reported under Chapter 5B by the International Labor Organization ("ILO"). To achieve an industry-specific labor value, we relied on industry-specific labor data from the countries we determined to be both economically comparable to the PRC, and significant producers of comparable merchandise. A full description of the industry-specific wage rate calculation methodology is provided in the Factor Valuation Memorandum. The Department calculated a simple average industry-specific wage rate of $1.49 for these preliminary results. Specifically, for this review, the Department has calculated the wage rate using a simple average of the data provided to the ILO under Sub-Classification 29 of the ISIC-Revision 3 standard by countries determined to be both economically comparable to the PRC and significant

[46] *See* DunAn's Preliminary Analysis Memorandum.

[47] *See, e.g., Notice of Preliminary Determination of Sales at Less Than Fair Value, Negative Preliminary Determination of Critical Circumstances and Postponement of Final Determination: Certain Frozen and Canned Warmwater Shrimp From the Socialist Republic of Vietnam, 69 FR 42672, 42682 (July 16, 2004), unchanged in Final Determination of Sales at Less Than Fair Value: Certain Frozen and Canned Warmwater Shrimp from the Socialist Republic of Vietnam,* 69 FR 71005 (December 8, 2004).

[48] *See* Factor Valuation Memorandum.

[49] *See* Factor Valuation Memorandum. *See also, e.g., Certain Kitchen Appliance Shelving and Racks From the People's Republic of China: Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination,* 74 FR 9591, 9600 (March 5, 2009) ("*Kitchen Racks Prelim*"), unchanged in *Certain Kitchen Appliance Shelving and Racks From the People's Republic of China: Final Determination of Sales at Less than Fair Value,* 74 FR 36656 (July 24, 2009) ("*Kitchen Racks Final*").

[50] *See Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Preliminary Results and Preliminary Partial Rescission of Antidumping Duty Administrative Review,* 70 FR 54007, 54011 (September 13, 2005), unchanged in *Certain Frozen Fish Fillets From the Socialist Republic of Vietnam: Final Results of the First Administrative Review,* 71 FR 14170 (March 21, 2006); and *China Nat'l Mach. Import & Export Corp.* v. *United States,* 293 F. Supp. 2d 1334 (Ct. Int'l Trade 2003), *affirmed* 104 Fed. Appx. 183 (Fed. Cir. 2004).

[51] *See* H.R. Rep. No. 100–576 at 590 (1988).

[52] *See* Factor Valuation Memorandum.

producers of comparable merchandise. The Department finds the two-digit description under ISIC-Revision 3 ("Manufacture of Machinery and Equipment, n.e.c.") to be the best available wage rate surrogate value on the record because it is specific and derived from industries that produce merchandise comparable to the subject merchandise. Consequently, we averaged the ILO industry-specific wage rate data or earnings data available from the following countries found to be economically comparable to the PRC and significant producers of comparable merchandise: The Philippines, Egypt, Indonesia, Ukraine, Jordan, Thailand, Ecuador, and Peru. For further information on the calculation of the wage rate, see the Factor Valuation Memorandum.

We valued electricity using the updated electricity price data for small, medium, and large industries, as published by the Central Electricity Authority, an administrative body of the Government of India, in its publication titled *Electricity Tariff & Duty and Average Rates of Electricity Supply in India,* dated March 2008.[53] These electricity rates represent actual country-wide, publicly-available information on tax-exclusive electricity rates charged to small, medium, and large industries in India. We did not inflate this value because utility rates represent current rates, as indicated by the effective dates listed for each of the rates provided.

We valued natural gas using April through June 2002 data from the Gas Authority of India Ltd. ("GAIL"). Consistent with the Department's recent determination in *Polyvinyl Alcohol,*[54] we averaged the base and ceiling gas prices of 2,850 rupees (Rs.) per thousand cubic meters ("m^3") and Rs. 2,150 per thousand m^3 and added a transmission charge of Rs. 1,150 per thousand m^3 in calculating a value of Rs. 3.650 per m^3. To be contemporaneous with the POR, the Department inflated this factor value using the POR wholesale WPI for India.[55]

We valued water using the average water rate charged by the Maharashtra Industrial Development Corporation, which shows industrial water rates from various areas within the Maharashtra Province, India ("Maharashtra Data"). The water rate is based on the average of the Indian rupees per m^3 rates for 386 industrial usage rates[56] in India for the months April, May, June, October, November and December 2009. We did not inflate this rate since all data points are contemporaneous with the POR.[57]

We valued truck freight expenses using an Indian per-unit average rate calculated for the POR using data on the following Web site: *http://www.infobanc.com/logistics/logtruck.htm*.[58] The logistics section of this Web site contains inland freight truck rates between many large Indian cities. We did not inflate this rate since it is contemporaneous with the POR.

We valued brokerage and handling using a price list of export procedures necessary to export a standardized cargo of goods from India. The price list is compiled based on a survey case study of the procedural requirements for trading a standard shipment of goods by ocean transport in India that is published in *Doing Business 2010: India,* published by the World Bank.[59]

We valued marine insurance using a price quote we obtained from RJG Consultants. RJG Consultants is a market-economy provider of marine insurance. We did not inflate this rate since it is contemporaneous with the POR.[60]

19 CFR 351.408(c)(4) directs the Department to value overhead, general, and administrative expenses ("SG&A") and profit using non-proprietary information gathered from producers of identical or comparable merchandise in the surrogate country. In this administrative review, Petitioner submitted the 2009–2010 financial statements of one valve producer, Rane Engine Valve Ltd. ("Rane"), and one fastener producer, Sundram Fasteners Limited ("Sundram"). In addition, it placed the 2008–2009 financial statements of a second valve producer, Triton Valves Ltd. ("Triton") on the record of this review. DunAn provided the 2009–2010 audited financial statements of two producers of cast products, Siddhi Cast Private Limited ("Siddhi Cast") and Pyrocast India Private Limited ("Pyrocast"), and the 2008–2009 financial statements for Siddhi Cast. Sanhua provided the 2009–2010 audited financial statements of one producer of copper products, Nissan Copper ("Nissan Copper"). In addition, it provided the 2008–2009 and the 2009–2010 audited financial statements for a producer of aluminum foils, Gujarat Foils, Ltd. ("Gujarat Foils").

First, we determined not to use the 2009–2010 audited financial statements for Gujarat Foils because Gujarat Foils audited financial statements indicate that it received benefits under the Duty Entitlement Pass Book ("DEPB Premium"),[61] a program the Department has previously determined to be countervailable. Congress indicated that the Department should "avoid using any prices which it had reason to believe or suspect may be dumped or subsidized prices." Consistent with this Congressional directive, the Department's practice is to not use financial statements of a company that we have reason to believe or suspect may have received subsidies where there are other sufficient reliable and representative data on the record for purposes of calculating the surrogate financial ratios, because the financial statements of companies receiving actionable subsidies are less representative of the financial experience of the relevant industry than the ratios derived from financial statements that do not contain evidence of subsidization.

Second, we have determined not to rely on the 2009–2010 audited financial statements of Nissan Copper, Gujarat Foils, Rane, and Sundram, or the 2008–2009 audited financial statements of Gujarat Foils, Siddhi Cast and Triton as surrogate producers under section 351.408(c)(4) of the Department's regulations because the companies do not produce merchandise that is identical or comparable to subject merchandise. Gujarat Foils produces aluminum rolled products, aluminum foils and strips,[62] products that are comparable to subject merchandise. Rane produces engine valves which are made of martensitic and austentitic grades of valve steel, cast iron, chilled cast iron or cold forgings, rather than brass[63] and thus are not comparable to the subject merchandise. Sundram produces high tensile fasteners, cold extruded parts, powder metal parts, iron powder, radiator caps, gear shifters, hot forged parts, precision forged differential gears, water pumps, oil pumps, fuel pumps, belt tensioners, rocker arm assemblies, cam followers,

[53] *See* Factor Valuation Memorandum.

[54] *See Polyvinyl Alcohol from the People's Republic of China: Final Results of Antidumping Duty Administrative Review,* 71 FR 27991 (May 15, 2006) and accompanying Issues and Decision Memorandum at Comment 2.

[55] *See* Factor Valuation Memorandum.

[56] The 386 rates consist of 193 rates for industrial use in "industrial areas," and 193 rates for industrial use "outside industrial areas."

[57] *See* Factor Valuation Memorandum.

[58] *See id.*

[59] *See id.*

[60] *See id.*

[61] *See* Gujarat Foils Limited's 18th Annual Report 2009–2010 at p. 27 in Sanhua's SV Comments at Exhibit SV–3.

[62] *See* Gujarat Foils, Ltd.'s Annual Report 2008–2009 at p. 12 in Sanhua's SV Comments at Exhibit SV–3.

[63] *See* Memorandum to the File, "Frontseating Service Valves from the People's Republic of China: Information from the Web Indicating that Rane Engine Valve Limited's ("Rane") Engine Valves Are Made of Iron and Steel," dated April 12, 2011.

bearing housings, hubs and shafts, tappets & other engine components and valve train parts.[64] Thus, like Gujarat Foils and Rane, Sundram does not produce comparable merchandise.

Triton produces valve cores and tire tube valves.[65] Tire tube valves are similar to the valves used as inputs into the subject merchandise, and valve cores are inputs into the subject merchandise. Nissan Copper produces copper pipes and tubes, sections, mother tubes, flat rods and wire bars, and copper ingots, billets and/or bars.[66] Copper tubes are also used as an input into the subject merchandise. Therefore, Triton and Nissan Copper's financial statements are not comparable because the financial statements of companies that produce inputs which are consumed in manufacturing the subject merchandise would not capture downstream costs of producing the subject merchandise.[67]

As a result, we have preliminarily determined to use the contemporaneous 2009–2010 audited financial statements of Siddhi and Pyrocast as the basis of the surrogate financial ratios in this review. Siddhi and Pyrocast both produce valves. Both companies earned a profit, and there is no record evidence to indicate that they received benefits that the Department has a basis to believe or suspect to be countervailable.[68] Further, their audited financial statements are complete and are sufficiently detailed to disaggregate materials, labor, overhead, and SG&A expenses. For a complete listing of all the inputs and a detailed discussion about our SV selections, see the Factor Valuation Memorandum.

Currency Conversion

Where necessary, the Department made currency conversions into U.S. dollars, in accordance with section 773A(a) of the Act, based on the exchange rates in effect as certified by the Federal Reserve Bank on the date of the U.S. sale.

Weighted-Average Dumping Margins

The preliminary weighted-average dumping margin is as follows:

MAGNESIUM METAL FROM THE PRC

Exporter	Weighted-average margin (percentage)
Zhejiang DunAn Hetian Metal Co. Ltd	38.85
Zhejiang Sanhua Co., Ltd	5.35
PRC-Wide Entity	55.62

Disclosure

The Department will disclose calculations performed for these preliminary results to the parties within five days of the date of publication of this notice in accordance with 19 CFR 351.224(b).

Comments

Any interested party may request a hearing within 30 days of publication of these preliminary results.[69] If a hearing is requested, the Department will announce the hearing schedule at a later date. Interested parties may submit case briefs and/or written comments no later than 30 days after the publication of the preliminary results of this review.[70] Rebuttal briefs and rebuttals to written comments, limited to issues raised in such briefs or comments, may be filed no later than five days after the time limit for filing the case briefs.[71] Further, we request that parties submitting written comments provide the Department with an additional electronic copy of those comments on a CD–ROM. The Department intends to issue the final results of this administrative review, which will include the results of its analysis of issues raised in all comments, and at a hearing, within 120 days of publication of these preliminary results, pursuant to section 751(a)(3)(A) of the Act.

Assessment Rates

The Department will determine, and CBP shall assess, antidumping duties on all appropriate entries of subject merchandise in accordance with the final results of this review.[72] For assessment purposes, we calculated importer- or customer-specific assessment rates for merchandise subject to this review. The Department intends to issue assessment instructions to CBP 15 days after the publication date of the final results of this review. In accordance with 19 CFR 351.212(b)(1), we calculated exporter/importer (or customer)-specific assessment rates for the merchandise subject to this review. We calculated an *ad valorem* rate for each importer or customer by dividing the total dumping margins for reviewed sales to that party by the total entered value associated with those transactions. For duty-assessment rates calculated on this basis, we will direct CBP to assess the *resulting ad valorem* rate against the entered customs values for the subject merchandise. Where appropriate, we calculated a per-unit rate for each importer or customer by dividing the total dumping margins for reviewed sales to that party by the total sales quantity associated with those transactions. For duty-assessment rates calculated on this basis, we will direct CBP to assess the resulting per-unit rate against the entered quantity of the subject merchandise. Where an importer- or customer-specific assessment rate is *de minimis* (*i.e.,* less than 0.50 percent) in accordance with the requirement of 19 CFR 351.106(c)(2), the Department will instruct CBP to assess that importer's or customer's entries of subject merchandise without regard to antidumping duties. We intend to instruct CBP to liquidate entries containing subject merchandise exported by the PRC-wide entity (including Tycon Alloy Industries (Shenzhen) Co.) at the PRC-wide rate we determine in the final results of this review.

Cash Deposit Requirements

The following cash deposit requirements will be effective upon publication of the final results of this administrative review for shipments of the subject merchandise from the PRC entered, or withdrawn from warehouse, for consumption on or after the publication date, as provided by sections 751(a)(2)(C) of the Act: (1) For DunAn and Sanhua, which have separate rates, the cash deposit rates will be that established in the final results of this review (except, if the rates are zero or *de minimis,* then zero cash deposit will be required); (2) for previously investigated or reviewed PRC and non-PRC exporters not listed above that received a separate rate in a prior segment of this proceeding, the cash deposit rate will continue to be the exporter-specific rate; (3) for all PRC exporters of subject merchandise that have not been found to be entitled to a

[64] *See* Memorandum to the File, "Frontseating Service Valves from the People's Republic of China: Information Concerning the Products Produced by Sundram Fasteners Limited ("Sundram")", dated April 26, 2011.

[65] *See* Memorandum to the File, "Frontseating Service Valves from the People's Republic of China: Information Concerning the Products Produced by Triton Valves Ltd. ("Triton")," dated April 26, 2011.

[66] *See* Nissan Copper's 21st Annual Report 2009–2010 at page 13 in Sanhua' SV Comments at Exhibit SV–3.

[67] *See* Certain Steel Threaded Rod from the People's Republic of China: Final Determination of Sales at Less Than Fair Value, 74 FR 8907 (February 27, 2009) and accompanying issues and decision memorandum at Comment 1.

[68] *See* Memorandum to the File, "Frontseating Service Valves from the People's Republic of China: Information from the Web Indicating that Pyrocast India Private Ltd. ("Pyrocast") and Siddhi Cast Private Ltd. ("Siddhi Cast") Produce Valves," dated April 11, 2011.

[69] *See* 19 CFR 351.310(c).

[70] *See* 19 CFR 351.309(c)(ii).

[71] *See* 19 CFR 351.309(d).

[72] *See* 19 CFR 351.212(b).

separate rate, the cash deposit rate will be the PRC-wide rate of 55.62 percent; and (4) for all non-PRC exporters of subject merchandise which have not received their own rate, the cash deposit rate will be the rate applicable to the PRC exporter that supplied that non-PRC exporter. These deposit requirements, when imposed, shall remain in effect until further notice.

Notification to Importers

This notice serves as a preliminary reminder to importers of their responsibility under 19 CFR 351.402(f)(2) to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this review period. Failure to comply with this requirement could result in the Secretary's presumption that reimbursement of antidumping duties occurred and the subsequent assessment of double antidumping duties.

This administrative review and notice are in accordance with sections 751(a)(1) and 777(i) of the Act and 19 CFR 351.213.

Dated: May 2, 2011.

Ronald K. Lorentzen,

Deputy Assistant Secretary for Import Administration.

[FR Doc. 2011–11253 Filed 5–6–11; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

Naval Postgraduate School; Notice of Consolidated Decision on Application for Duty-Free Entry of Electron Microscope

This is a decision consolidated pursuant to Section 6(c) of the Educational, Scientific, and Cultural Materials Importation Act of 1966 (Pub. L 89–651, as amended by Pub. L 106–36; 80 Stat. 897; 15 CFR part 301). Related records can be viewed between 8:30 a.m. and 5 p.m. in Room 3720, U.S. Department of Commerce, 14th and Constitution Avenue, NW., Washington, DC.

Docket Number: 11–021. *Applicant:* Naval Postgraduate School, Monterey, CA 93943. *Instrument:* Electron Microscope. *Manufacturer:* FEI Company, Czech Republic. *Intended Use:* See notice at 76 FR 15945, March 22, 2011.

Comments: None received. *Decision:* Approved. No instrument of equivalent scientific value to the foreign instrument, for such purposes as this instrument is intended to be used, is being manufactured in the United States at the time the instrument was ordered. *Reasons:* Each foreign instrument is an electron microscope and is intended for research or scientific educational uses requiring an electron microscope. We know of no electron microscope, or any other instrument suited to these purposes, which was being manufactured in the United States at the time of order of each instrument.

Dated: May 3, 2011.

Gregory W. Campbell,

Director, Subsidies Enforcement Office, Import Administration.

[FR Doc. 2011–11252 Filed 5–6–11; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

UChicago Argonne, LLC, et al.; Notice of Consolidated Decision on Applications for Duty-Free Entry of Scientific Instruments

This is a decision pursuant to Section 6(c) of the Educational, Scientific, and Cultural Materials Importation Act of 1966 (Pub. L. 89–651, as amended by Pub. L. 106–36; 80 Stat. 897; 15 CFR part 301). Related records can be viewed between 8:30 a.m. and 5 p.m. in Room 3720, U.S. Department of Commerce, 14th and Constitution Ave., NW., Washington, DC.

Docket Number: 11–012. *Applicant:* UChicago Argonne, LLC, Lemont, IL 60439. *Instrument:* TFS500 Atomic Layer Deposition System. *Manufacturer:* Beneq OY, Finland. *Intended Use:* See notice at 76 FR 15945, March 22, 2011. *Comments:* None received. *Decision:* Approved. We know of no instruments of equivalent scientific value to the foreign instruments described below, for such purposes as each is intended to be used, that was being manufactured in the United States at the time of its order. *Reasons:* Pertinent characteristics of this instrument include its modular deposition chamber in order that the system can be reconfigured to optimize the coating process for different substrates. It also has a precursor delivery system that can be heated to 500 degrees Celsius to vaporize non-volatile chemical precursors. Lastly, it is capable of inert gas purging between the deposition chamber and outer heating chambers to contain the precursors without the need for a gas-tight seal at this junction.

Docket Number: 11–016. *Applicant:* UChicago Argonne, LLC, Lemont, IL 60439–4873. *Instrument:* Single Roll Presser. *Manufacturer:* A-Pro Co., Ltd., South Korea. *Intended Use:* See notice at 76 FR 15945, March 22, 2011. *Comments:* None received. *Decision:* Approved. We know of no instruments of equivalent scientific value to the foreign instruments described below, for such purposes as each is intended to be used, that was being manufactured in the United States at the time of its order. *Reasons:* The instrument is unique in that it is semi-automated with a high attention to dimensional tolerances, temperature control and safety, which ensures that the research cells made will be of industrial level quality and consistency.

Docket Number: 11–018. *Applicant:* Purdue University, Birck Nanotechnology Center, West Lafayette, IN 47907–2057. *Instrument:* Rapid Thermal Annealer. *Manufacturer:* Quailflow Jipelec, France. *Intended Use:* See notice at 76 FR 15945, March 22, 2011. *Comments*: None received. *Decision:* Approved. We know of no instruments of equivalent scientific value to the foreign instruments described below, for such purposes as each is intended to be used, that was being manufactured in the United States at the time of its order. *Reasons:* Key characteristics of this instrument include a temperature ramp rate of 300 degrees Celsius per second, vacuum purge capability and contamination control.

Dated: May 3, 2011.

Gregory W. Campbell,

Director, Subsidies Enforcement Office, Import Administration.

[FR Doc. 2011–11250 Filed 5–6–11; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[C–533–821]

Certain Hot-Rolled Carbon Steel Flat Products From India: Final Rescission of Countervailing Duty Administrative Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

DATES: *Effective Date:* May 9, 2011.

FOR FURTHER INFORMATION CONTACT: Kristen Johnson, AD/CVD Operations, Office 3, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Ave., NW., Room 4014, Washington, DC 20230, *telephone:* (202) 482–4793.

SUPPLEMENTARY INFORMATION:

Background

On December 1, 2010, the Department of Commerce (the Department) published a notice of opportunity to request an administrative review of the countervailing duty (CVD) order on certain hot-rolled carbon steel flat products from India. *See Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity To Request Administrative Review,* 75 FR 74682 (December 1, 2010). On January 3, 2011, we received from United States Steel Corporation, a domestic producer of subject merchandise, a request for the Department to conduct an administrative review of Ispat Industries Limited (Ispat), for the period of review (POR) of January 1, 2010, through December 31, 2010.

On January 28, 2011, the Department published the notice of initiation of the administrative review of the CVD order covering Ispat for the period January 1, 2010, through December 31, 2010. *See Initiation of Antidumping and Countervailing Duty Administrative Reviews,* 76 FR 5137 (January 28, 2011). On February 4, 2011, Ispat notified the Department that it had no shipments of subject merchandise to the United States during the POR.[1]

We conducted an internal customs data query on February 7, 2011.[2] We also issued a "no shipments inquiry" message to U.S. Customs and Border Protection (CBP), which posted the message on February 16, 2011.[3] The results of the customs data query indicated that Ispat had no sales, shipments, or entries of subject merchandise to the United States during the POR. We did not receive any information from CBP contrary to Ispat's claim of no sales, shipments, or entries of subject merchandise to the United States during the POR.

On March 21, 2011, we published the notice of preliminary rescission of this CVD administrative review with respect to Ispat, and provided interested parties with 20 days to comment. *See Certain Hot-Rolled Carbon Steel Flat Products from India: Preliminary Rescission of Countervailing Duty Administrative Review,* 76 FR 15299 (March 21, 2011) (*Preliminary Rescission*). The Department received no comments on its intent to rescind the review.

Rescission of Review

Pursuant to 19 CFR 351.213(d)(3), the Department may rescind an administrative review, with respect to a particular exporter or producer, if the Secretary concludes that, during the period covered by the review, there were no entries, exports, or sales of the subject merchandise to the United States by that producer or exporter.

Based on our analysis of the shipment data, we determine that Ispat did not ship subject merchandise to the United States during the POR. Therefore, in accordance with 19 CFR 351.213(d)(3), and consistent with our practice,[4] we are rescinding the review for Ispat. Since Ispat is the only producer/exporter for which a review was requested and initiated, we are also rescinding, in whole, the administrative review of this CVD order for the period January 1, 2010, through December 31, 2010. The Department intends to issue appropriate assessment instructions to CBP 15 days after the date of publication of this notice.

Notification Regarding Administrative Protective Order

This notice serves as a final reminder to parties subject to administrative protective order (APO) of their responsibility concerning the disposition of proprietary information disclosed under APO in accordance with 19 CFR 351.305(a)(3) of the Department's regulations, which continues to govern business proprietary information in this segment of the proceeding. Timely written notification of the return/destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and the terms of an APO is a violation that is subject to sanction.

This notice is issued and published in accordance with sections 751(a)(1) and 777(i)(1) of the Tariff Act of 1930, as amended, and 19 CFR 351.213(d)(4).

Dated: May 4, 2011.

Christian Marsh,

Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations.

[FR Doc. 2011–11259 Filed 5–6–11; 8:45 am]

BILLING CODE 3510–DS–P

[1] This public document is available on the public file in the Department's Central Record Unit (CRU) located in room 7046 of the main Commerce building.

[2] *See* Memorandum to the File from Kristen Johnson, Case Analyst, IA Operations, Office 3, regarding "Customs Data Query Results," (February 8, 2011). A public version of this memorandum is available on the public file in the CRU.

[3] *See* Message number 1047301, available at *http://addcvd.cbp.gov.*

[4] *See, e.g., Welded Carbon Steel Standard Pipe and Tube from Turkey: Notice of Rescission of Countervailing Duty Administrative Review, In Part,* 74 FR 47921 (September 18, 2009).

DEPARTMENT OF COMMERCE

International Trade Administration

Renewable Energy and Energy Efficiency Advisory Committee

AGENCY: International Trade Administration, U.S. Department of Commerce.

ACTION: Notice of an open meeting.

SUMMARY: The Renewable Energy and Energy Efficiency Advisory Committee (RE&EEAC) will meet to hear briefings on the state of renewable energy finance and to discuss the development of recommendations on increasing the international competitiveness of U.S. exports.

DATES: May 31, 2011, from 1 p.m. to 6 p.m. Eastern Standard Time (EST), and June 1, 2011, from 8 a.m. to 3:30 p.m. EST.

ADDRESSES: Please note: The meetings will be held at two different locations:

May 31st: Citigroup, 388 Greenwich Street, New York, NY 10013.

June 1st: Skadden, Arps, Slate, Meagher, and Flom, 4 Times Square, New York, NY 10036.

FOR FURTHER INFORMATION CONTACT: Brian O'Hanlon, Office of Energy and Environmental Technologies Industries (OEEI), International Trade Administration, U.S. Department of Commerce at (202) 482–3492; *e-mail: brian.ohanlon@trade.gov.* This meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to OEEI at (202) 482–3492.

SUPPLEMENTARY INFORMATION:

Background: The Secretary of Commerce established the RE&EEAC pursuant to his discretionary authority and in accordance with the Federal Advisory Committee Act (5 U.S.C. App.) on July 14, 2010. The RE&EEAC provides the Secretary of Commerce with consensus advice from the private sector on the development and administration of programs and policies to expand the international competitiveness of the U.S. renewable energy and energy efficiency industries. The RE&EEAC held its first meeting on December 7, 2010, and a subsequent meeting on March 1, 2010.

The meeting is open to the public and the room is disabled-accessible. Public seating is limited and available on a first-come, first-served basis. Members of the public wishing to attend the meeting must notify Brian O'Hanlon at the contact information above by 5 p.m. EST on Thursday, May 26, in order to

pre-register for clearance into either location. Please specify any request for reasonable accommodation by May 23, 2011. Last minute requests will be accepted, but may be impossible to fill. A limited amount of time, from 3 p.m.–3:30 p.m. on June 1, will be available for pertinent brief oral comments from members of the public attending the meeting.

Any member of the public may submit pertinent written comments concerning the RE&EEAC's affairs at any time before or after the meeting. Comments may be submitted to *brian.ohanlon@trade.gov* or to the Renewable Energy and Energy Efficiency Advisory Committee, Office of Energy and Environmental Technologies Industries (OEEI), International Trade Administration, Room 4830, 1401 Constitution Avenue, NW., Washington, DC 20230. To be considered during the meeting, comments must be received no later than 5 p.m. EST on May 26, 2011, to ensure transmission to the Committee prior to the meeting. Comments received after that date will be distributed to the members, but may not be considered at the meeting.

Copies of RE&EEAC meeting minutes will be available within 30 days of the meeting.

Edward A. O'Malley,

Director, Office of Energy and Environmental Industries.

[FR Doc. 2011–11197 Filed 5–6–11; 8:45 am]

BILLING CODE 3510–DR–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–932]

Certain Steel Threaded Rod From the People's Republic of China: Preliminary Results of the First Administrative Review and Preliminary Rescission, in Part

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

SUMMARY: The Department of Commerce ("Department") is conducting the first administrative review of the antidumping duty order on certain steel threaded rod ("steel threaded rod") from the People's Republic of China ("PRC") for the period of review ("POR") October 8, 2008, through February 28, 2010. As discussed below, we preliminarily determine that sales have been made below normal value ("NV"). If these preliminary results are adopted in our final results of review, we will instruct U.S. Customs and Border Protection ("CBP") to assess antidumping duties on entries of subject merchandise during the POR for which the importer-specific assessment rates are above *de minimis.*

DATES: *Effective Date:* May 9, 2011.

FOR FURTHER INFORMATION CONTACT: Toni Dach or Steven Hampton, AD/CVD Operations, Office 9, Import Administration, International Trade Administration, Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230; telephone: (202) 482–1655, (202) 482–0116, respectively.

SUPPLEMENTARY INFORMATION:

Background

On April 14, 2009, the Department published in the **Federal Register** the antidumping duty order on steel threaded rod from the PRC. *See Certain Steel Threaded Rod from the People's Republic of China: Notice of Antidumping Duty Order,* 74 FR 17154 (April 14, 2009) ("*Order*"). On April 1, 2010, the Department published in the **Federal Register** a notice of opportunity to request an administrative review of the *Order* for the period October 8, 2008, through March 31, 2010. *See Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity To Request Administrative Review,* 75 FR 16426 (April 1, 2010).

Between April 1, 2010, and April 30, 2010, we received requests to conduct administrative reviews from Vulcan Threaded Products Inc. ("Petitioner") and certain Chinese companies. On May 28, 2010, the Department published in the **Federal Register** a notice of initiation of this administrative review. *See Initiation of Antidumping and Countervailing Duty Administrative Reviews,* 75 FR 29976, 29980–29982 (May 28, 2010) ("*Initiation Notice*").

On November 19, 2010, the Department published in the **Federal Register** a notice extending by 120 days the time period for issuing the preliminary results. *See Certain Steel Threaded Rod From the People's Republic of China: Extension of Time Limit for the Preliminary Results of Antidumping Duty Administrative Review,* 75 FR 70908 (November 19, 2010).

Of the 126 companies/groups for which we initiated an administrative review, seven companies submitted separate rate certifications, three companies submitted separate rate applications, one company stated that it did not export subject merchandise to the United States during the POR, and the remaining 115 companies did not submit a separate rate application to the Department.

Respondent Selection

Section 777A(c)(1) of the Tariff Act of 1930, as amended ("the Act") directs the Department to calculate individual dumping margins for each known exporter or producer of the subject merchandise. However, section 777A(c)(2) of the Act gives the Department discretion to limit its examination to a reasonable number of exporters or producers if it is not practicable to examine all exporters or producers involved in the review.

On June 7, 2010, the Department placed on the record data obtained from CBP with respect to the selection of respondents, inviting comments from interested parties. *See* Letter from the Department to Interested Parties: 2008—2010 Administrative Review of the Antidumping Duty Order of Certain Steel Threaded Rod from the PRC: CBP Data for Respondent Selection, dated June 7, 2010. Between June 7, 2010, and August 9, 2010, Petitioner and certain respondents provided comments on the Department's respondent selection methodology.

Because of the large number of exporters involved in this review, the Department limited the number of respondents individually examined and issued a respondent selection memorandum on September 24, 2010. Based upon section 777A(c)(2)(B) of the Act, the Department selected IFI & Morgan Limited and RMB Fasteners Ltd. ("RMB/IFI Group" [1]) and Gem-Year Industrial Co. Ltd. ("Gem-Year") because they were the largest exporters, by volume, of subject merchandise during the POR. *See* Memorandum to James Doyle from Steven Hampton: First Administrative Review of Steel Threaded Rod from the People's Republic of China: Selection of Respondents for Individual Review, dated September 24, 2010. The Department sent antidumping duty questionnaires to the RMB/IFI Group and Gem-Year on September 27, 2010. Gem-Year submitted its Section A Questionnaire Response ("AQR") on October 25, 2010. The RMB/IFI Group submitted its AQR on October 27, 2010. The RMB/IFI Group and Gem-Year submitted their Sections C and D

[1] The Department determined that these companies constituted a single entity in the antidumping duty investigation on steel threaded rod from the PRC. *See Certain Steel Threaded Rod from the People's Republic of China: Preliminary Determination of Sales at Less Than Fair Value,* 73 FR 58931 (October 8, 2008), unchanged in *Certain Steel Threaded Rod from the People's Republic of China: Final Determination of Sales at Less Than Fair Value,* 74 FR 8907 (February 27, 2009).

Questionnaire Responses on November 17, 2010. The Department issued supplemental questionnaires to Gem-Year in November 2010, and to the RMB/IFI Group between November 2010 and April 2011, to which all companies responded.

On December 7, 2010, the Department deselected Gem-Year as a mandatory respondent in this review, and selected Shanghai Recky International Trading Co. Ltd. ("Shanghai Recky"), a separate rate respondent, as an additional mandatory respondent. *See* Memorandum to the File, through Scot T. Fullerton, from Steven Hampton: First Administrative Review of Certain Steel Threaded Rod from the People's Republic of China: Replacement Respondent Selection, dated December 7, 2010 ("Replacement Respondent Selection Memo"). The Department sent a full antidumping duty questionnaire to Shanghai Recky on December 8, 2010. On December 29, 2010, Shanghai Recky informed the Department that it would not participate in this review, and did not respond to the Department's December 8, 2010, antidumping duty questionnaire.

The Department issued supplemental questionnaires to the RMB/IFI Group between November 2010 and April 2011, to which it responded.

Preliminary Partial Rescission of Administrative Review

On December 7, 2010, the Department indicated that it intended to rescind this administrative review with respect to Gem-Year, as Gem-Year failed to meet the requirements to qualify for an administrative review. Due to the proprietary nature of the information underlying this decision, a detailed analysis of the facts is available in the Replacement Respondent Selection Memo. On March 7, 2011, the Department referred this matter to CBP for possible further investigation and enforcement action.

Additionally, pursuant to 19 CFR 351.213(d)(3), we have preliminarily determined that Zhejiang New Oriental Fastener Co., Ltd. ("New Oriental") made no shipments of subject merchandise during the POR for this administrative review. The Department received a no-shipment certification from New Oriental on July 26, 2010. The Department issued a no-shipment inquiry to CBP, informing CBP of the no-shipment certifications from New Oriental during the POR, and asking CBP to provide any information that contradicted this certification. We did not receive any response from CBP of subject merchandise into the United States exported by this company. Consequently, as New Oriental made no exports of subject merchandise to the United States during the POR, we preliminarily intend to rescind this administrative review with respect to New Oriental. *See* 19 CFR 351.213(d)(3).

Withdrawal of Request for Administrative Review

On January 7, 2011, Petitioner submitted a withdrawal of its request for administrative review of Certified Products International Inc. ("CPII"), Haiyan Dayu Fasteners Co., Ltd. ("Haiyan Dayu"), and Jiashan Zhongsheng Metal Products Co., Ltd. ("Jiashan Zhongsheng"). Pursuant to 19 CFR 351.213(d)(1), the Department will rescind an administrative review, in whole or in part, if the party that requested the review withdraws its request within 90 days of the date of publication of the notice of initiation of the requested review. Petitioner's request to withdraw its request for review was submitted 224 days after the initiation of this administrative review. 19 CFR 351.213(d)(1) permits the Department to extend beyond 90 days the time limit for withdrawing a request for review. In this instance, the Department finds that it is not reasonable to extend the deadline and declines to rescind the review with respect to these companies. Specifically, at the point that Petitioner's request to withdraw its request for review was received, this proceeding was at an advanced stage (lasting from May 28, 2010, to January 7, 2011), and the Department had expended significant resources in the 224 days we had spent conducting this review. Therefore, the Department has continued to treat CPII, Haiyan Dayu, and Jiashan Zhongsheng as respondents in this administrative review.

Surrogate Country and Surrogate Value Data

On November 8, 2010, the Department provided a letter to interested parties inviting comments on surrogate country selection and surrogate value ("SV") data.[2] On November 18, 2010, the Department extended the comment period for surrogate country selection from November 29, 2010, to January 14, 2011, and for SV comments from December 15, 2010, to March 3, 2011. On January 14, 2011, the Department received comments on surrogate country selection from Petitioner. On March 3, 2011, the Department received information to value factors of production ("FOP") from Petitioner and the RMB/IFI Group. On March 14, 2011, the Department received a rebuttal response to Petitioner's SV submission from the RMB/IFI Group. The SVs placed on the record from the RMB/IFI Group were obtained from sources in India, whereas the SVs placed on the record by Petitioner were from sources in both India and Thailand.

[2] *See* the Department's Letter to All Interested Parties: Antidumping Duty Administrative Review of Certain Steel Threaded Rod from the People's Republic of China, dated November 8, 2010.

Scope of the Order

The merchandise covered by the order is steel threaded rod. Steel threaded rod is certain threaded rod, bar, or studs, of carbon quality steel, having a solid, circular cross section, of any diameter, in any straight length, that have been forged, turned, cold-drawn, cold-rolled, machine straightened, or otherwise cold-finished, and into which threaded grooves have been applied. In addition, the steel threaded rod, bar, or studs subject to the order are non-headed and threaded along greater than 25 percent of their total length. A variety of finishes or coatings, such as plain oil finish as a temporary rust protectant, zinc coating (*i.e.,* galvanized, whether by electroplating or hot-dipping), paint, and other similar finishes and coatings, may be applied to the merchandise.

Included in the scope of the order are steel threaded rod, bar, or studs, in which: (1) Iron predominates, by weight, over each of the other contained elements; (2) the carbon content is 2 percent or less, by weight; and (3) none of the elements listed below exceeds the quantity, by weight, respectively indicated:

- 1.80 percent of manganese, or
- 1.50 percent of silicon, or
- 1.00 percent of copper, or
- 0.50 percent of aluminum, or
- 1.25 percent of chromium, or
- 0.30 percent of cobalt, or
- 0.40 percent of lead, or
- 1.25 percent of nickel, or
- 0.30 percent of tungsten, or
- 0.012 percent of boron, or
- 0.10 percent of molybdenum, or
- 0.10 percent of niobium, or
- 0.41 percent of titanium, or
- 0.15 percent of vanadium, or
- 0.15 percent of zirconium.

Steel threaded rod is currently classifiable under subheading 7318.15.5050, 7318.15.5090, and 7318.15.2095 of the United States Harmonized Tariff Schedule ("HTSUS"). Although the HTSUS subheading is provided for convenience and customs purposes, the written description of the merchandise is dispositive.

Excluded from the scope of the order are: (a) Threaded rod, bar, or studs

which are threaded only on one or both ends and the threading covers 25 percent or less of the total length; and (b) threaded rod, bar, or studs made to American Society for Testing and Materials ("ASTM") A193 Grade B7, ASTM A193 Grade B7M, ASTM A193 Grade B16, or ASTM A320 Grade L7.

Non-Market Economy Country Status

In every case conducted by the Department involving the PRC, the PRC has been treated as a non-market economy ("NME") country. In accordance with section 771(18)(C)(i) of the Act, any determination that a foreign country is an NME country shall remain in effect until revoked by the administering authority. *See, e.g., Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Coated Free Sheet Paper from the People's Republic of China,* 72 FR 30758, 30760 (June 4, 2007), unchanged in *Final Determination of Sales at Less Than Fair Value: Coated Free Sheet Paper from the People's Republic of China,* 72 FR 60632 (October 25, 2007). None of the parties to this proceeding have contested such treatment. Accordingly, we calculated the NV in accordance with section 773(c) of the Act, which applies to NME countries.

Separate Rates

In proceedings involving NME countries, it is the Department's practice to begin with a rebuttable presumption that all companies within the country are subject to government control and thus should be assessed a single antidumping duty rate. *See, e.g., Separate Rates and Combination Rates in Antidumping Investigations involving Non-Market Economy Countries,* 70 FR 17233 (April 5, 2005)(as corrected in 70 FR 19841 (April 14, 2005)); *see also Notice of Final Determination of Sales at Less Than Fair Value, and Affirmative Critical Circumstances, In Part: Certain Lined Paper Products From the People's Republic of China,* 71 FR 53079, 53082 (September 8, 2006) ("*CLPP LTFV Final*"); *Final Determination of Sales at Less Than Fair Value and Final Partial Affirmative Determination of Critical Circumstances: Diamond Sawblades and Parts Thereof from the People's Republic of China,* 71 FR 29303, 29307 (May 22, 2006) ("*Diamond Sawblades*"). It is the Department's policy to assign all exporters of merchandise subject to investigation in an NME country this single rate unless an exporter can affirmatively demonstrate that it is sufficiently independent so as to be entitled to a separate rate. *See, e.g., Diamond Sawblades,* 71 FR at 29307. Exporters can demonstrate this independence through the absence of both *de jure* and *de facto* government control over export activities. *Id.* The Department analyzes each entity exporting the subject merchandise under a test arising from the *Final Determination of Sales at Less Than Fair Value: Sparklers From the People's Republic of China,* 56 FR 20588, 20589 (May 6, 1991) ("*Sparklers*"), as further developed in *Notice of Final Determination of Sales at Less Than Fair Value: Silicon Carbide From the People's Republic of China,* 59 FR 22585, 22586–87 (May 2, 1994) ("*Silicon Carbide*"). However, if the Department determines that a company is wholly foreign-owned or located in a market economy ("ME"), then a separate rate analysis is not necessary to determine whether it is free of government control. In this review, one company, the RMB/IFI Group, provided evidence that it was wholly owned by individuals or companies located in MEs in its separate rate application. Therefore, because the RMB/IFI Group is wholly foreign-owned and there is no record evidence indicating that it is under the control of the government of the PRC, a separate rates analysis is not necessary to determine whether the RMB/IFI Group is free of government control. *See Narrow Woven Ribbons with Woven Selvedge from the People's Republic of China: Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination,* 75 FR 7244, 7249 (February 18, 2010) (determining that the respondent was wholly foreign-owned and, thus, qualified for a separate rate), unchanged in *Narrow Woven Ribbons With Woven Selvedge From the People's Republic of China: Final Determination of Sales at Less Than Fair Value,* 75 FR 41808 (July 19, 2010). Accordingly, the Department has preliminarily granted a separate rate to the RMB/IFI Group.

In addition to the RMB/IFI Group, the Department received a separate rate application from Gem-Year, and a separate rate certification from Shanghai Recky. With respect to Gem-Year, as further discussed in the "Preliminary Rescission of Review" section of this notice, the Department has determined that Gem-Year does not meet the requirements to participate in this review. Therefore, the Department is not assessing Gem-Year's eligibility for a separate rate in the context of this review.

With regard to Shanghai Recky, we note that, as further discussed in the "Adverse Facts Available" section of this notice, it failed to respond to the Department's full questionnaire, including sections regarding separate rates, once it was selected as a mandatory respondent. Because Shanghai Recky failed to respond to the Department's request for information regarding its eligibility for a separate rate once it was selected as a mandatory respondent, it will be preliminarily included as a part of the PRC-wide entity.[3]

In addition, the Department received separate rate applications or certifications from the following seven companies: Haiyan Dayu Fasteners Co. Ltd.; Jiaxing Xinyue Standard Part Co. Ltd.; Jiashan Zhongsheng Metal Products; Shanghai Prime Machinery Co. Ltd.; Suntec Industries Co. Ltd.; CPII; and Haiyan Julong Standard Part Co. Ltd. ("Haiyan Julong") (collectively, "Separate Rate Applicants"). Finally, 115 companies subject to the review submitted neither separate rate applications nor certifications.[4] Therefore, because these companies did not demonstrate their eligibility for separate rate status, they are preliminarily included as part of the PRC-wide entity.

a. Absence of De Jure Control

The Department considers the following *de jure* criteria in determining whether an individual company may be granted a separate rate: (1) An absence of restrictive stipulations associated with an individual exporter's business and export licenses; (2) any legislative enactments decentralizing control of companies; and (3) any other formal measures by the government decentralizing control of companies. *See Sparklers,* 56 FR at 20589. The evidence provided by the Separate Rate Applicants supports a preliminary finding of *de jure* absence of government control based on the following: (1) An absence of restrictive stipulations associated with the individual exporter's business and export licenses; (2) there are applicable legislative enactments decentralizing control of the companies; and (3) there are formal measures by the government decentralizing control of companies. *See, e.g.,* Haiyan Julong's Separate Rate Application at Questions 5 and 6.

b. Absence of De Facto Control

Typically the Department considers four factors in evaluating whether each respondent is subject to *de facto*

[3] *See Certain Steel Nails From the People's Republic of China: Final Results of the First Antidumping Duty Administrative Review,* 76 FR 16379, 16381 (March 23, 2011) ("*Nails from the PRC*").

[4] *See* Appendix 1.

government control of its export functions: (1) Whether the export prices are set by or are subject to the approval of a government agency; (2) whether the respondent has authority to negotiate and sign contracts and other agreements; (3) whether the respondent has autonomy from the government in making decisions regarding the selection of management; and (4) whether the respondent retains the proceeds of its export sales and makes independent decisions regarding disposition of profits or financing of losses. *See Silicon Carbide,* 59 FR at 22586–87; *see also Notice of Final Determination of Sales at Less Than Fair Value: Furfuryl Alcohol From the People's Republic of China,* 60 FR 22544, 22545 (May 8, 1995). The Department has determined that an analysis of *de facto* control is critical in determining whether respondents are, in fact, subject to a degree of government control which would preclude the Department from assigning separate rates. The evidence provided by the Separate Rate Applicants supports a preliminary finding of *de facto* absence of government control based on the following: (1) The companies set their own export prices independent of the government and without the approval of a government authority; (2) the companies have authority to negotiate and sign contracts and other agreements; (3) the companies have autonomy from the government in making decisions regarding the selection of management; and (4) there is no restriction on any of the companies' use of export revenue. *See, e.g.,* Haiyan Julong's Separate Rate Application at Exhibits IV 2–b, 2–d, 8, 9, and 10. Therefore, the Department preliminarily finds that the Separate Rate Applicants have established that they qualify for a separate rate under the criteria established by *Silicon Carbide* and *Sparklers.*

Separate Rate Calculation

In the "Respondent Selection" section above, we stated that the Department employed a limited examination methodology, as it did not have the resources to examine all companies for which a review request was made, and selected two exporters as mandatory respondents in this review. The RMB/IFI Group participated in the review as a selected mandatory respondent. The other selected mandatory respondent, Shanghai Recky, informed the Department that it would not participate in this review and did not respond to the Department's antidumping duty questionnaire. *See* "Respondent Selection" section above. Seven additional companies (listed in the "Separate Rates" section above) submitted timely information as requested by the Department and remained subject to review as separate rate respondents.

We note that the statute and the Department's regulations do not directly address the establishment of a rate to be applied to individual companies not selected for examination where the Department limited its examination in an administrative review pursuant to section 777A(c)(2) of the Act. The Department's practice in cases involving limited selection based on exporters accounting for the largest volumes of trade has been to look for guidance in section 735(c)(5) of the Act, which provides instructions for calculating the all-others rate in an investigation. Consequently, the Department generally weight-averages the rates calculated for the mandatory respondents, excluding zero and *de minimis* rates and rates based entirely on facts available ("FA"), and applies that resulting weighted-average margin to non-selected cooperative separate-rate respondents. *See, e.g., Wooden Bedroom Furniture From the People's Republic of China: Preliminary Results of Antidumping Duty Administrative Review, Preliminary Results of New Shipper Review and Partial Rescission of Administrative Review,* 73 FR 8273 (February 13, 2008) (unchanged in *Wooden Bedroom Furniture From the People's Republic of China: Final Results of Antidumping Duty Administrative Review and New Shipper Review,* 73 FR 49162 (August 20, 2008)).

However, the Department has, for these preliminary results, calculated a *de minimis* dumping margin for the sole participating mandatory respondent, the RMB/IFI Group. The Department has additionally assigned an adverse facts available dumping margin to the other mandatory respondent, Shanghai Recky, as part of the PRC-wide entity. *See* "Adverse Facts Available" and "Application of Total Adverse Facts Available to the PRC-Wide Entity" sections below. In this circumstance, we again look to section 735(c)(5) of the Act for guidance. Section 735(c)(5)(A) of the Act instructs that we are not to calculate an all-others rate using any zero or *de minimis* margins or any margins based entirely on FA. Section 735(c)(5)(B) of the Act also provides that, where all margins are zero rates, *de minimis* rates, or rates based entirely on FA, we may use "any reasonable method" for assigning the rate to non-selected respondents. Therefore, because all rates in this proceeding are *de minimis* or based entirely on FA, we must look to other reasonable means to assign separate rate margins to non-reviewed companies eligible for a separate rate in this review. We find that a reasonable method is to assign to non-reviewed companies in this review the rate we calculated in the most recent segment for any company that was not zero, *de minimis,* or based entirely on FA. Pursuant to this method, we are assigning the rate of 55.16 percent, the most recent positive rate (from the less-than-fair-value ("LTFV") investigation) calculated for cooperative separate rate respondents, to those separate rate respondents in the instant review. We note that this calculated rate from the LTFV investigation is the only calculated positive rate in any segment of this proceeding. *See Order.*

PRC-Wide Entity

Upon initiation of the administrative review, we provided an opportunity for all companies for which the review was initiated to complete either the separate rate application or certification. The separate rate certification and separate rate application were available at: *http://ia.ita.doc.gov/nme/nme-sep-rate.html.*

We have preliminarily determined that 116 companies failed to demonstrate their eligibility for a separate rate and are properly considered part of the PRC-wide entity. In NME proceedings, " 'rates' may consist of a single dumping margin applicable to all exporters and producers." *See* 19 CFR 351.107(d). As explained above in the "Separate Rates" section, all companies within the PRC are considered to be subject to government control unless they are able to demonstrate an absence of government control with respect to their export activities. Accordingly, such companies are assigned a single antidumping duty rate distinct from the separate rate(s) determined for companies that are found to be free of government control with respect to their export activities. We consider that the overall influence that the PRC has been found to have over its economy warrants determining separate rates for the entity that are distinct from the rates found for companies that have provided sufficient evidence to establish that they operate freely with respect to their export activities. *See Notice of Final Antidumping Duty Determination of Sales at Less Than Fair Value and Affirmative Critical Circumstances: Certain Frozen Fish Fillets from the Socialist Republic of Vietnam,* 68 FR 37116 (June 23, 2003). In this regard, we note that no party has submitted

evidence in this proceeding to demonstrate that such government influence is no longer present or that our treatment of the PRC-wide entity is otherwise incorrect. Therefore, we are assigning the PRC-wide entity's current rate of 206%, the only rate ever determined for the PRC-wide entity in this proceeding.

Surrogate Country

When the Department conducts an antidumping administrative review of imports from an NME country, section 773(c)(1) of the Act directs it to base NV, in most circumstances, on the NME producer's FOPs, valued in a surrogate ME country or countries considered to be appropriate by the Department. In accordance with section 773(c)(4) of the Act, in valuing the FOPs, the Department shall utilize, to the extent possible, the prices or costs of FOPs in one or more ME countries that are: (1) At a level of economic development comparable to that of the NME country; and (2) significant producers of comparable merchandise. Further, pursuant to 19 CFR 351.408(c)(2), the Department will normally value FOPs in a single country, except for labor. The sources of the surrogate factor values are discussed under the "Normal Value" section below and in the Memorandum to the File through Scot Fullerton, Program Manager, Office 9 from Toni Dach, International Trade Analyst, Office 9: 2008–2010 Antidumping Duty Administrative Review of Steel Threaded Rod from the People's Republic of China: Surrogate Values for the Preliminary Results, dated May 2, 2011 ("Surrogate Value Memorandum").

On March 3, 2011, Petitioner and the RMB/IFI Group submitted SV information for valuation of FOPs. On March 14, 2011, the Department received a rebuttal response to the Petitioner's SV submission from the RMB/IFI Group.

Pursuant to its practice, the Department received a list of potential surrogate countries from Import Administration's Office of Policy ("OP").[5] The OP determined that India, the Philippines, Indonesia, Thailand, Ukraine, and Peru were at a comparable level of economic development to the PRC. *See* Surrogate Country List. The Department considers the six countries identified by the OP in its Surrogate Country List as "equally comparable in terms of economic development." *Id.* Thus, we find India, the Philippines, Indonesia, Thailand, Ukraine, and Peru are all at an economic level of development equally comparable to that of the PRC. We note that the Surrogate Country List is a non-exhaustive list of economically comparable countries. We also note that the record does not contain publicly available SV factor information for the Philippines, Indonesia, Ukraine, or Peru. Thus, we find that India and Thailand are both economically comparable to the PRC and significant producers of the subject merchandise.

The Department's practice when selecting the best available information for valuing FOPs, in accordance with section 773(c)(1) of the Act, is to select, to the extent practicable, SVs which are product-specific, representative of a broad-market average, publicly available, contemporaneous with the POR and exclusive of taxes and duties.[6] As a general matter, the Department prefers to use publicly available data representing a broad-market average to value SVs. *Id.* Petitioner provided data for Thailand from the World Trade Atlas ("WTA") to value some material inputs, and financial statements from producers of comparable merchandise in Thailand to calculate surrogate financial ratios. Petitioner and the RMB/IFI Group provided data for India from the WTA and various government, non-governmental organization, and industry publications to value all material inputs, energy, and movement expenses, and financial statements from producers of comparable merchandise in India to calculate surrogate financial ratios. Although the data on the record for both India and Thailand to value material inputs meets the Department's criteria for selecting the best available information, we preliminarily find that the information on the record for India is more complete, as data is provided to value all material inputs, energy, and movement expenses. In addition, the Indian financial statements on the record for producers of comparable merchandise reflect the experiences of producers of a broad range of comparable merchandise, while the financial statements on the record from producers of comparable merchandise in Thailand reflects the experience of producers of only one type of comparable merchandise (*i.e.,* springs). Thus, because there are Indian data on the record for valuation of all FOPs, and a wider variety of Indian financial statements with which to calculate surrogate financial ratios, we preliminarily find that Thailand is not the most appropriate surrogate country for purposes of this review.

Therefore, given the facts summarized above, we find that the information on the record supports a finding that India is an appropriate surrogate country because it is at a similar level of economic development to the PRC, pursuant to section 773(c)(4) of the Act, it is a significant producer of comparable merchandise, and reliable, publicly available data have been provided on the record for surrogate valuation purposes.

In accordance with 19 CFR 351.301(c)(3)(ii), for the final results in an antidumping administrative review, interested parties may submit publicly available information to value FOPs within 20 days after the date of publication of these preliminary results.

Date of Sale

The RMB/IFI Group reported the invoice date as the date of sale because it claims that, for its U.S. sales of subject merchandise made during the POR, the material terms of sale were established on the invoice date. The Department preliminarily determines that the invoice date is the most appropriate date to use as the RMB/IFI Group's date of sale, in accordance with 19 CFR 351.401(i).[7]

Fair Value Comparisons

To determine whether sales of steel threaded rod to the United States by the RMB/IFI Group were made at less than NV, the Department compared the export price ("EP") to NV, as described in the "U.S. Price," and "Normal Value" sections below.

U.S. Price

A. Export Price

In accordance with section 772(a) of the Act, the Department calculated the EP for sales to the United States from the RMB/IFI Group's sales, because the first sale to an unaffiliated party was made before the date of importation. The Department calculated EP based on the price to unaffiliated purchasers in the United States. In accordance with section 772(c) of the Act, as appropriate,

[5] *See* Memorandum from Carole Showers, Director, Office of Policy, to Scot T. Fullerton, Program Manager, AD/CVD Operations, Office 9: Request for a List of Surrogate Countries for an Antidumping Duty Administrative Review of the Antidumping Duty Order on Certain Steel Threaded Rod from the People's Republic of China, dated November 3, 2010 ("Surrogate Country List").

[6] *See Fresh Garlic from the People's Republic of China: Final Results and Partial Rescission of the Eleventh Administrative Review and New Shipper Reviews,* 72 FR 34438 (June 22, 2007) and accompanying Issues and Decision Memorandum at Comment 2A.

[7] *See also Notice of Final Determination of Sales at Less Than Fair Value and Negative Final Determination of Critical Circumstances: Certain Frozen and Canned Warmwater Shrimp From Thailand,* 69 FR 76918 (December 23, 2004) and accompanying Issues and Decision Memorandum at Comment 10.

we deducted foreign inland freight and brokerage and handling from the starting price to unaffiliated purchasers. Each of these services was either provided by an NME vendor or paid for using an NME currency. Thus, we based the deduction of these movement charges on SVs. Additionally, for international freight provided by an ME provider and paid in an ME currency, we used the actual cost per kilogram of the freight. *See* Surrogate Value Memorandum for details regarding the SVs for movement expenses.

Normal Value

Section 773(c)(1) of the Act provides that the Department shall determine the NV using an FOP methodology if the merchandise is exported from an NME and the information does not permit the calculation of NV using home-market prices, third-country prices, or constructed value under section 773(a) of the Act. The Department bases NV on the FOPs because the presence of government controls on various aspects of NMEs renders price comparisons and the calculation of production costs invalid under the Department's normal methodologies.

Factor Valuations

In accordance with section 773(c) of the Act, we calculated NV based on FOPs reported by the respondents for the POR, except as noted above. To calculate NV, we multiplied the reported per-unit factor-consumption rates by publicly available Indian SVs. In selecting the SVs, we considered the quality, specificity, and contemporaneity of the data. As appropriate, we adjusted input prices by including freight costs to make them delivered prices. Specifically, we added to Indian import SVs a surrogate freight cost using the shorter of the reported distance from the domestic supplier to the factory of production or the distance from the nearest seaport to the factory of production where appropriate. This adjustment is in accordance with the Court of Appeals for the Federal Circuit's ("CAFC") decision in *Sigma Corp.* v. *United States,* 117 F.3d 1401, 1407–1408 (Fed. Cir. 1997). *See* Department Policy Bulletin No. 10.2: Inclusion of International Freight Costs When Import Prices Constitute Normal Value, dated November 1, 2010.

Where we did not use Indian Import Statistics, we calculated freight based on the reported distance from the supplier to the factory.

In accordance with the *OTCA 1988* legislative history, the Department continues to apply its long-standing practice of disregarding SVs if it has reason to believe or suspect the source data may be subsidized.[8] In this regard, the Department has previously found that it is appropriate to disregard such prices from India, Indonesia, South Korea and Thailand because we have determined that these countries maintain broadly available, non-industry specific export subsidies.[9] Based on the existence of these subsidy programs that were generally available to all exporters and producers in these countries at the time of the POR, the Department finds that it is reasonable to infer that all exporters from India, Indonesia, South Korea and Thailand likely benefitted from these subsidies.

Additionally, we disregarded prices from NME countries.[10] Finally, imports that were labeled as originating from an "unspecified" country were excluded from the average value, because the Department could not be certain that they were not from either an NME country or a country with general export subsidies. For further detail, *see* Surrogate Value Memorandum.

Therefore, based on the information currently available, we have not used prices from these countries either in calculating the Indian import-based SVs or in calculating ME input values. In instances where an ME input was obtained solely from suppliers located in these countries, we used Indian import-based SVs to value the input.

In selecting the best available information for valuing FOPs, in accordance with section 773(c)(1) of the Act, the Department's practice is to select, to the extent practicable, surrogate values which are non-export average values, most contemporaneous with the POR product-specific, and tax-exclusive. *See, e.g., Notice of Preliminary Determination of Sales at Less Than Fair Value, Negative Preliminary Determination of Critical Circumstances and Postponement of Final Determination: Certain Frozen and Canned Warmwater Shrimp From the Socialist Republic of Vietnam,* 69 FR 42672, 42682 (July 16, 2004), unchanged in *Final Determination of Sales at Less Than Fair Value: Certain Frozen and Canned Warmwater Shrimp From the Socialist Republic of Vietnam,* 69 FR 71005 (December 8, 2004). The record shows that data in the Indian Import Statistics, as well as those from the other Indian sources, are contemporaneous with the POR, product-specific, and tax-exclusive. *See* Surrogate Value Memorandum. In those instances where we could not obtain publicly available information contemporaneous to the POR with which to value factors, we adjusted the SVs using, where appropriate, the Indian Wholesale Price Index ("WPI") as published in the *International Financial Statistics* of the International Monetary Fund.[11] For each input value, we used the average value per unit for that input imported into India from all countries that the Department has not previously determined to be NME countries. Import statistics from countries that the Department has determined to be countries which subsidized exports (*i.e.,* Indonesia, South Korea, Thailand, and India) and imports from unspecified countries also were excluded in the calculation of the average value. *See Notice of Final Determination of Sales at Less Than Fair Value and Negative Final Determination of Critical Circumstances: Certain Color Television Receivers From the People's Republic of China,* 69 FR 20594 (April 16, 2004).

The Department used Indian Import Statistics to value the raw material and packing material inputs that the RMB/IFI Group used to produce the merchandise under review during the POR, except where listed below. For a detailed description of all SVs for

[8] *See Omnibus Trade and Competitiveness Act of 1988, Conf. Report to Accompany H.R. 3,* H.R. Rep. No. 576, 100th Cong., 2nd Sess. (1988) ("*OTCA 1988*") at 590.

[9] *See, e.g., Carbazole Violet Pigment 23 from India: Final Results of the Expedited Five-year (Sunset) Review of the Countervailing Duty Order,* 75 FR 13257 (March 19, 2010) and accompanying Issues and Decision Memorandum at 4–5; *Certain Cut-to-Length Carbon-Quality Steel Plate from Indonesia: Final Results of Expedited Sunset Review,* 70 FR 45692 (August 8, 2005) and accompanying Issues and Decision Memorandum at 4; *Corrosion-Resistant Carbon Steel Flat Products from the Republic of Korea: Final Results of Countervailing Duty Administrative Review,* 74 FR 2512 (January 15, 2009) and accompanying Issues and Decision Memorandum at 17, 19–20; *Final Affirmative Countervailing Duty Determination: Certain Hot-Rolled Carbon Steel Flat Products From Thailand,* 66 FR 50410 (October 3, 2001) and accompanying Issues and Decision Memorandum at 23.

[10] *See Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From the People's Republic of China: Final Results of 1998–1999 Administrative Review, Partial Rescission of Review, and Determination Not To Revoke Order in Part,* 66 FR 1953 (January 10, 2001) and accompanying Issues and Decision Memorandum at Comment 1.

[11] *See, e.g.,* Preliminary Determination of Sales at Less Than Fair Value and Partial Affirmative Determination of Critical Circumstances: Certain Polyester Staple Fiber from the People's Republic of China, 71 FR 77373, 77380 (December 26, 2006), unchanged in *Final Determination of Sales at Less Than Fair Value and Partial Affirmative Determination of Critical Circumstances: Certain Polyester Staple Fiber from the People's Republic of China,* 72 FR 19690 (April 19, 2007); *Preliminary Determination of Sales at Less Than Fair Value, Affirmative Critical Circumstances, In Part, and Postponement of Final Determination: Certain Lined Paper Products from the People's Republic of China,* 71 FR 19695 (April 17, 2006), unchanged in *CLPP LTFV Final.*

respondents, *see* Surrogate Value Memorandum.

On May 14, 2010, the U.S. Court of Appeals for the Federal Circuit ("CAFC") in *Dorbest Ltd.* v. *United States,* 604 F.3d 1363, 1372 (Fed. Cir. 2010), found that the "{regression-based} method for calculating wage rates {as stipulated by 19 CFR 351.408(c)(3)} uses data not permitted by {the statutory requirements laid out in section 773 of the Act (*i.e.,* 19 U.S.C. § 1677b(c))}." The Department is continuing to evaluate options for determining labor values in light of the recent CAFC decision. However, for these preliminary results, we have calculated an hourly wage rate to use in valuing the respondent's reported labor input by averaging industry-specific earnings and/or wages in countries that are economically comparable to the PRC and that are significant producers of comparable merchandise.

For the preliminary results of this administrative review, the Department is valuing labor using a simple average industry-specific wage rate using earnings or wage data reported under Chapter 5B by the International Labor Organization ("ILO"). To achieve an industry-specific labor value, we relied on industry-specific labor data from the countries we determined to be both economically comparable to the PRC, and significant producers of comparable merchandise. A full description of the industry-specific wage rate calculation methodology is provided in the Surrogate Value Memorandum. The Department calculated a simple average industry-specific wage rate of $1.95 for these preliminary results. Specifically, for this review, the Department has calculated the wage rate using a simple average of the data provided to the ILO under Sub-Classification 27 of the ISIC–Revision 3 standard by countries determined to be both economically comparable to the PRC and significant producers of comparable merchandise. The Department finds the two-digit description under ISIC–Revision 3 ("Manufacture of Basic Metals") to be the best available wage rate SV on the record because it is specific and derived from industries that produce merchandise comparable to the subject merchandise. Consequently, we averaged the ILO industry-specific wage rate data or earnings data available from the following countries found to be economically comparable to the PRC and are significant producers of comparable merchandise: the Philippines, Egypt, Indonesia, Ukraine, Jordan, Thailand, Ecuador, and Peru. For further information on the calculation of the wage rate, *see* Surrogate Value Memorandum.

We valued zinc chloride using data from the publication *Chemical Weekly. See* Surrogate Value Memorandum.

We valued electricity using data from the Central Electricity Authority of the Government of India in its publication titled *Electricity Tariff & Duty and Average Rates of Electricity Supply in India,* dated March 2008. *See* Surrogate Value Memorandum.

We valued water using data from the Maharastra Industrial Development Corporation (*http://www.midcindia.org*). We inflated the value using the POR average WPI rate. *Id.*

We valued diesel using the 2007 diesel fuel price in India reported by the IEA statistics for *Energy Prices & Taxes, First Quarter 2007.* We inflated the value using the POR average WPI rate. *Id.*

To value truck freight, we used data from The Great Indian Bazaar, Gateway to Overseas Markets available at *http://www.infobanc.com. Id.*

To value marine insurance, the Department used rates from RJG Consultants. These rates are for sea freight from the Far East Region. *Id.*

To value factory overhead, selling, general, & administrative expenses, and profit, we used the simple average of the 2008–2009 financial statement of Nasco Steels Private Limited, the 2009–2010 financial statement of Rajratan Global Wire Limited, the 2008–2009 financial statement of Bansidhar Granites Private Limited, the 2008–2009 financial statement of J&K Wire & Steel Industries (P) Ltd., and the 2009–2010 financial statement of Sterling Tools Limited, all of which are manufacturers of processed steel wire rod or steel round bar products. *See* Surrogate Value Memorandum, at Exhibit 9.

Currency Conversion

Where necessary, the Department made currency conversions into U.S. dollars, in accordance with section 773A(a) of the Act, based on the exchange rates in effect on the dates of the U.S. sales, as certified by the Federal Reserve Bank. We relied on the daily exchange rates posted on the Import Administration Web site (*http://www.trade.gov/ia/*). *See* Surrogate Value Memorandum.

Facts Available

Sections 776(a)(1) and 776(a)(2) of the Act provide that, if necessary information is not available on the record, or if an interested party: (A) Withholds information that has been requested by the Department; (B) fails to provide such information in a timely manner or in the form or manner requested, subject to sections 782(c)(1) and (e) of the Act; (C) significantly impedes a proceeding under the antidumping statute; or (D) provides such information but the information cannot be verified, the Department shall, subject to subsection 782(d) of the Act, use facts otherwise available in reaching the applicable determination.

Section 782(c)(1) of the Act provides that if an interested party "promptly after receiving a request from {the Department} for information, notifies {the Department} that such party is unable to submit the information requested in the requested form and manner, together with a full explanation and suggested alternative forms in which such party is able to submit the information," the Department may modify the requirements to avoid imposing an unreasonable burden on that party.

Section 782(d) of the Act provides that, if the Department determines that a response to a request for information does not comply with the request, the Department will inform the person submitting the response of the nature of the deficiency and shall, to the extent practicable, provide that person the opportunity to remedy or explain the deficiency. If that person submits further information that continues to be unsatisfactory, or this information is not submitted within the applicable time limits, the Department may, subject to section 782(e) of the Act, disregard all or part of the original and subsequent responses, as appropriate.

Section 782(e) of the Act states that the Department shall not decline to consider information deemed "deficient" under section 782(d) if: (1) The information is submitted by the established deadline; (2) the information can be verified; (3) the information is not so incomplete that it cannot serve as a reliable basis for reaching the applicable determination; (4) the interested party has demonstrated that it acted to the best of its ability in providing the information and meeting the requirements established by the Department; and (5) the information can be used without undue difficulties.

On November 17, 2010, RMB/IFI Group requested that it be excused from reporting FOP data for one model, as this model was produced prior to the POR. RMB/IFI Group suggested that the Department instead use the input consumption for the most similar model for this CONNUM due to the associated burdens for RMB/IFI Group to report, and for the Department to verify the data provided by the RMB/IFI Group,

for a single model produced outside of the POR.

In accordance with section 776(a)(1) of the Act, the Department is applying FA to determine the NV for the sales corresponding to the FOP data that the RMB/IFI Group has been excused from reporting. As FA, the Department is applying the FOPs for the most similar models to this unreported model. Due to the proprietary nature of the factual information concerning the FOPs applied for this model, these issues are addressed in a separate business proprietary memorandum where a detailed explanation of the FA calculation is provided. *See* Memorandum to Scot Fullerton, Program Manager, AD/CVD Operations, Office 9, from Steven Hampton, Case Analyst, AD/CVD Operations, Office 9: Preliminary Results Analysis Memorandum for The RMB IFI Group in the Antidumping Duty Administrative Review of Certain Steel Threaded Rod from the People's Republic of China, dated May 2, 2011 ("RMB IFI Prelim Analysis Memo").

Adverse Facts Available

Section 776(b) of the Act provides that the Department may use an adverse inference in applying the facts otherwise available when a party has failed to cooperate by not acting to the best of its ability to comply with a request for information. Such an adverse inference may include reliance on information derived from the petition, the final determination, a previous administrative review, or other information placed on the record.

On December 29, 2010, Shanghai Recky informed the Department that it would not participate in this review, and did not respond to the Department's December 8, 2010, antidumping duty questionnaire. Because Shanghai Recky withheld information requested by the Department, failed to provide requested information in the form and manner required, and significantly impeded the Department's proceeding by not providing requested information, pursuant to section 776(a)(2)(A), (B), and (C) of the Act, the Department will preliminarily rely on facts otherwise available in determining the rate applicable to Shanghai Recky in this administrative review. Furthermore, in accordance with section 776(b) of the Act, the Department is applying an adverse inference in selecting the facts otherwise available to apply to Shanghai Recky because we find that it has failed to cooperate to the best of its ability in replying to the Department's requests for information. Therefore, for purposes of these preliminary results, we find that Shanghai Recky should be treated as part of the PRC-wide entity because it failed to respond to the Department's request for information regarding its eligibility for a separate rate.

Application of Total Adverse Facts Available to the PRC-Wide Entity

In the *Initiation Notice,* the Department stated that if one of the companies for which this review was initiated "does not qualify for a separate rate, all other exporters of STR from the PRC that have not qualified for a separate rate are deemed to be covered by this review as part of the single PRC entity." *See Initiation Notice,* 75 FR at 29984, footnote 6. As noted above, Shanghai Recky, one of the companies for which this review was initiated, has not qualified for a separate rate. Therefore, the PRC-wide entity is now under review.

As explained above, Shanghai Recky, as part of the PRC-wide entity, did not respond to the Department's December 8, 2010, Sections A, C, and D questionnaire. For these reasons, the Department has preliminarily determined that the PRC-wide entity: (1) Withheld information that was requested; (2) failed to provide information within the deadlines established and in the form and manner requested by the Department; (3) significantly impeded this proceeding; and (4) provided information that cannot be verified. Therefore, in accordance with subsections 776(a)(2)(A) through (D) of the Act, the Department has preliminarily based the dumping margin of the PRC-wide entity on the facts otherwise available. Further, because the PRC-wide entity failed to cooperate by not acting to the best of its ability to comply with the Department's requests for information, the Department has preliminarily determined, pursuant to section 776(b) of the Act, to use an inference that is adverse to the interests of the PRC-wide entity in selecting from among the facts otherwise available.

Selection of the Adverse Facts Available Rate

Section 776(b) of the Act and 19 CFR 351.308(c)(1) provide that the Department's adverse inference "may include reliance on information derived from (1) the petition, (2) a final determination in the investigation, (3) any previous review or determination, or (4) any other information placed on the record." In selecting a rate for use as AFA, the Department selects a rate that is sufficiently adverse "to effectuate the purpose of the facts available rule to induce respondents to provide the Department with complete and accurate information in a timely manner"[12]. Furthermore, it is the Department's practice to ensure "that the party does not obtain a more favorable result by failing to cooperate than if it had cooperated fully" [13] and to select "the highest rate on the record of the proceeding" [14] that can be corroborated, to the extent practicable.[15] Therefore, as AFA, the Department has preliminarily assigned the PRC-wide entity a dumping margin of 206.00 percent, which was the margin calculated in the petition, and is the highest dumping margin on the record of this proceeding.

Corroboration of Secondary Information

Section 776(c) of the Act provides that, when the Department relies on secondary information rather than on information obtained in the course of an investigation or review, it shall, to the extent practicable, corroborate that information from independent sources that are reasonably at its disposal. Secondary information is defined as information derived from the petition that gave rise to the investigation or review, the final determination concerning the subject merchandise, or any previous review under section 751 of the Act concerning the subject merchandise.[16] "Corroborate" means that the Department will satisfy itself that the secondary information to be used has probative value.[17] To corroborate secondary information, the Department will, to the extent practicable, examine the reliability and relevance of the information to be used.[18] Independent sources used to

[12] *See Notice of Final Determination of Sales at Less Than Fair Value: Static Random Access Memory Semiconductors From Taiwan,* 63 FR 8909, 8932 (February 23, 1998).

[13] *See* Statement of Administrative Action accompanying the Uruguay Round Agreements Act, H.R. Rep. No. 103–316, Vol. I, at 870 (1994) ("*SAA*"), reprinted at 1994 U.S.C.C.A.N. 4040, 4198–99.

[14] *See Certain Frozen Warmwater Shrimp from Brazil: Final Results and Partial Rescission of Antidumping Duty Administrative Review,* 73 FR 39940, 39942 (July 11, 2008).

[15] *See Fujian Lianfu Forestry Co., Ltd.* v. *United States,* 638 F. Supp. 2d 1325, 1336 (Ct. Int'l Trade 2009).

[16] *See SAA* at 870.

[17] *Id.*

[18] *See Tapered Roller Bearings and Parts Thereof, Finished and Unfinished From Japan, and Tapered Roller Bearings Four Inches or Less in Outside Diameter, and Components Thereof, From Japan; Preliminary Results of Antidumping Duty Administrative Reviews and Partial Termination of Administrative Reviews,* 61 FR 57391, 57392 (November 6, 1996), unchanged in *Tapered Roller Bearings and Parts Thereof, Finished and Unfinished From Japan, and Tapered Roller Bearings, Four Inches or Less in Outside Diameter,*

Continued

corroborate such information may include, for example, published price lists, official import statistics and customs data, and information obtained from interested parties during the particular investigation or review.[19]

To corroborate the 206.00 percent petition rate, we compared this margin to the margins we found for the RMB/IFI Group in this review. We found that the margin of 206.00 percent has probative value because it is in the range of the transaction-specific margins that we found for the RMB/IFI Group.[20] Accordingly, we find that the rate of 206.00 percent is corroborated within the meaning of section 776(c) of the Act.

Preliminary Results of Review

The Department preliminarily determines that the following weighted-average dumping margins exist:

Exporter	Weighted-average margin (percent)
RMB Fasteners Ltd., and IFI & Morgan Ltd. ("RMB/IFI Group")	[1].27
Suntec Industries Co., Ltd	55.16
Shanghai Prime Machinery Co. Ltd	55.16
Jiaxing Xinyue Standard Part Co., Ltd	55.16
Certified Products International Inc	55.16
Jiashan Zhongsheng Metal Products Co., Ltd	55.16
Haiyan Dayu Fasteners Co., Ltd	55.16
Haiyan Julong	55.16
PRC-wide Entity (including Gem-Year Industrial Co. Ltd. and Shanghai Recky International Trading Co. Ltd.)	206.00

[1] (de minimus).

The Department will disclose to parties the calculations performed in connection with these preliminary results within five days of the date of publication of this notice. *See* 19 CFR 351.224(b). As noted above, in accordance with 19 CFR 351.301(c)(3)(ii), for the final results of this administrative review, interested parties may submit publicly available information to value the FOPs within 20 days after the date of publication of these preliminary results. Interested parties must provide the Department with supporting documentation for the publicly available information to value each FOP. Additionally, in accordance with 19 CFR 351.301(c)(1), for the final results of this administrative review, interested parties may submit factual information to rebut, clarify, or correct factual information submitted by an interested party no less than ten days before, on, or after, the applicable deadline for submission of such factual information. However, the Department notes that 19 CFR 351.301(c)(1) permits new information only insofar as it rebuts, clarifies, or corrects information recently placed on the record. The Department generally cannot accept the submission of additional, previously absent-from-the-record alternative SV information pursuant to 19 CFR 351.301(c)(1). *See Glycine from the People's Republic of China: Final Results of Antidumping Duty Administrative Review and Final Rescission, in Part,* 72 FR 58809 (October 17, 2007) and accompanying Issues and Decision Memorandum at Comment 2.

Pursuant to 19 CFR 351.310(c), interested parties who wish to request a hearing, or to participate if one is requested, must submit a written request to the Assistant Secretary for Import Administration, Room 1117, within 30 days of the date of publication of this notice. Requests should contain: (1) The party's name, address and telephone number; (2) the number of participants; and (3) a list of issues to be discussed. *Id.* Issues raised in the hearing will be limited to those raised in the respective case briefs. Case briefs from interested parties may be submitted not later than 30 days of the date of publication of this notice, pursuant to 19 CFR 351.309(c). Rebuttal briefs, limited to issues raised in the case briefs, will be due five days later, pursuant to 19 CFR 351.309(d). Parties who submit case briefs or rebuttal briefs in this proceeding are requested to submit with each argument: (1) A statement of the issue; (2) a brief summary of the argument; and (3) a table of authorities. *See* 19 CFR 351.309(c) and (d).

The Department will issue the final results of this administrative review, including the results of its analysis of the issues raised in any written briefs, not later than 120 days after the date of publication of this notice, pursuant to section 751(a)(3)(A) of the Act.

Assessment Rates

Upon issuance of the final results, the Department will determine, and CBP shall assess, antidumping duties on all appropriate entries covered by these reviews. The Department intends to issue assessment instructions to CBP 15 days after the publication date of the final results of this review. In accordance with 19 CFR 351.212(b)(1), we calculated exporter/importer (or customer)-specific assessment rates for the merchandise subject to this review. Where the respondent has reported reliable entered values, we calculated importer (or customer)-specific *ad valorem* rates by aggregating the dumping margins calculated for all U.S. sales to each importer (or customer) and dividing this amount by the total entered value of the sales to each importer (or customer). *See* 19 CFR 351.212(b)(1). Where an importer (or customer)-specific *ad valorem* rate is greater than *de minimis,* we will apply the assessment rate to the entered value of the importers'/customers' entries during the POR. *See* 19 CFR 351.212(b)(1).

Where we do not have entered values for all U.S. sales, we calculated a per-unit assessment rate by aggregating the antidumping duties due for all U.S. sales to each importer (or customer) and dividing this amount by the total quantity sold to that importer (or customer). *See* 19 CFR 351.212(b)(1). To determine whether the duty assessment rates are *de minimis,* in accordance with the requirement set forth in 19 CFR 351.106(c)(2), we calculated importer (or customer)-specific ad valorem ratios based on the estimated entered value. Where an importer (or customer)-specific ad valorem rate is zero or *de minimis,* we will instruct CBP to liquidate appropriate entries without regard to antidumping duties. *See* 19 CFR 351.106(c)(2).

As noted above, consistent with *Nails from the PRC,* for the preliminary results, for the companies receiving a separate rate that were not selected for individual review, we have applied the margin calculated for the company selected for individual review, excluding any rates based entirely upon FA, pursuant to section 735(c)(5)(B) of the Act.

Cash Deposit Requirements

The following cash deposit requirements will be effective upon publication of the final results of this administrative review for all shipments of the subject merchandise entered, or withdrawn from warehouse, for consumption on or after the publication

and Components Thereof, From Japan; Final Results of Antidumping Duty Administrative Reviews and Termination in Part, 62 FR 11825 (March 13, 1997).

[19] *See Notice of Preliminary Determination of Sales at Less Than Fair Value: High and Ultra-High Voltage Ceramic Station Post Insulators from Japan,* 68 FR 35627, 35629 (June 16, 2003), unchanged in *Notice of Final Determination of Sales at Less Than Fair Value: High and Ultra-High Voltage Ceramic Station Post Insulators from Japan,* 68 FR 62560 (November 5, 2003); *Notice of Final Determination of Sales at Less Than Fair Value: Live Swine From Canada,* 70 FR 12181, 12183–84 (March 11, 2005).

[20] *See* RMB IFI Prelim Analysis Memo.

date, as provided for by section 751(a)(2)(C) of the Act: (1) For the exporters listed above, the cash deposit rate will be established in the final results of this review (except, if the rate is zero or *de minimis, i.e.,* less than 0.5 percent, no cash deposit will be required for that company); (2) for previously investigated or reviewed PRC and non-PRC exporters not listed above that have separate rates, the cash deposit rate will continue to be the exporter-specific rate published for the most recent period; (3) for all PRC exporters of subject merchandise which have not been found to be entitled to a separate rate, the cash deposit rate will be the PRC-wide rate of 206.00 percent; and (4) for all non-PRC exporters of subject merchandise which have not received their own rate, the cash deposit rate will be the rate applicable to the PRC exporters that supplied that non-PRC exporter. These deposit requirements, when imposed, shall remain in effect until further notice.

Notification to Importers

This notice also serves as a preliminary reminder to importers of their responsibility under 19 CFR 351.402(f)(2) to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this review period. Failure to comply with this requirement could result in the Secretary's presumption that reimbursement of antidumping duties occurred and the subsequent assessment of double antidumping duties.

This determination is issued and published in accordance with sections 751(a)(1) and 777(i)(1) of the Act and 19 CFR 351.221(b)(4).

Dated: May 2, 2011.

Ronald K. Lorentzen,

Deputy Assistant Secretary for Import Administration.

Appendix I

- Advanced Hardware Company
- Anhui Ningguo Zhongding Sealing Co. Ltd.
- Autocraft Industrial (Shanghai) Ltd.
- Beijing Peace Seasky International
- Billion Land Ltd.
- Century Distribution Systems
- China Jiangsu International Economic Technical Cooperation Corporation
- Dalian Americh International Trading Co., Ltd.
- Dalian Fortune Machinery Co., Ltd.
- Dalian Harada Industry Co., Ltd.
- EC International (Nantong) Co. Ltd.
- Ever Industries Co.
- Fastwell Industry Co. Ltd.
- Haining Light Industry Trade Co. Ltd.
- Haiyan County No. 1 Fasteners Factory (Hu-Hang Company)
- Haiyan Feihua Fasteners Co. Ltd.
- Haiyan Haiyu Hardware Co. Ltd.
- Haiyan Lianxiang Hardware Products
- Haiyan Sanhuan Import & Export Co.
- Haiyan Xiyue Electrical Appliances Co., Ltd.
- Haiyan Yida Fastener Co. Ltd.
- Handsun Industry General Co.
- Hangshou Daton Wind Power
- Hangshou Huayan Imp. and Exp. Co. Ltd.
- Hangzhou Everbright Imp & Exp Co. Ltd.
- Hangzhou Grand Imp. & Exp. Co., Ltd.
- Hangzhou Robinson Trading Co. Ltd.
- HD Supply Shanghai Distribution Center
- Hebei Richylin Trading Co Ltd.
- Honghua International Co. Ltd.
- Jiangsu Changzhou International
- Jiangsu Soho International Group Corp.
- Jiangsu Yanfei Special Steel Products
- Jiangxi Yuexin Standard Part Co. Ltd.
- Jiashan Lisan Metal Products Co. Ltd.
- Jiaxing Pacific Trading Co. Ltd.
- Jiaxing Tsr Hardware Inc.
- Jiaxing Wonper Imp. & Exp. Co. Ltd.
- JS Fasteners Co. Ltd.
- Jun Valve Junshan Co. Ltd.
- Kewell Products Corporation
- Lanba Fasteners Co. Ltd.
- Nantong Harlan Machinery Co. Ltd.
- Ningbiao Bolts & Nuts Manufacturing Co.
- Ningbo ABC Fasteners Co. Ltd.
- Ningbo Beilun Fastening Co. Ltd.
- Ningbo Beilun Longsheng
- Ningbo Daxie Chuofeng Industrial Development Co., Ltd.
- Ningbo Etdz Holding Ltd.
- Ningbo Fengya Imp. & Exp. Co. Ltd.
- Ningbo Fourway Co. Ltd.
- Ningbo Haishu Wit Imp. & Exp. Co. Ltd.
- Ningbo Haobo Commerce Co. Ltd.
- Ningbo Jiansheng Metal Products Co.
- Ningbo Shareway Import and Export Co. Ltd.
- Ningbo Weiye Co.
- Ningbo Xinyang Weiye
- Ningbo Yinzhou Foreign Trade Co. Ltd.
- Ningbo Yonggang Fastener Co. Ltd.
- Ningbo Zhenghai Yongding Fastener Co.
- Ningbo Zhengyu Fasteners Co., Ltd.
- Ningbo Zhongbin Fastener Mfg. Co. Ltd.
- Ningbo Zhongjiang High Strength
- Ningbo Zhongjiang Petroleum Pipes & Machinery Co. Ltd.
- Orient International Enterprise Ltd.
- Penglai City Bohai Hardware Tool Co. Ltd.
- Pennengineering Automotive Fastener
- Pinghu City Zhapu Screw Cap
- Qingdao H.R. International Trading Co.
- Qingdao Hengfeng Development Trade
- Qingdao Huaqing Imp. and Exp. Co. Ltd.
- Qingdao Morning Bright Trading
- Qingdao Uni-trend Int'l Ltd.
- Roberts Co.
- R-union Enterprise Co. Ltd.
- Shaanxi Shcceed Trading Co. Ltd.
- Shanghai Foreign Trade Enterprises Pudong Co. Ltd.
- Shanghai Huiyi International Trade
- Shanghai Jiading Foreign Trade Co. Ltd.
- Shanghai Overseas International Trading Co. Ltd.
- Shanghai Recky International Trading Co., Ltd.
- Shanghai Shangdian Washer Co.
- Shanghai Shenguang High Strength Bolts Co. Ltd.
- Shanghai Sunrise International Co.
- Shanghai Tianying Metal Parts Co. Ltd.
- Shanghai Wisechain Fastener Ltd.
- Shanghai Xianglong International Trading Co., Ltd. (Wangzhai Group)
- Shanghai Xiangrong International Trading Co., Ltd.
- Shenzhen Texinlong Trading Co.
- Shenzhen Xiguan Trading Ltd.
- Suzhou Textile Silk Co. Ltd.
- Synercomp China Co. Ltd.
- T and C Fastener Co. Ltd.
- T and L Industry Co. Ltd.
- T&S Technology LLC
- Tong Ming Enterprise
- Tri-Star Trading Co. (Hong Kong)
- Unimax International Ltd.
- Wujiang Foreign Trade Corporation
- Wuxi Zontai International
- Yancheng Sanwei Imp. & Exp. Co. Ltd.
- Yi Chi Hsiung Ind. Corp.
- Yixunda Industrial Products Supply
- Yueyun Imp & Exp Co. Ltd.
- Yuyao Nanshan Development Co. Ltd.
- Zhapu Creative Standard Parts Material Co., Ltd.
- Zhejiang Guorui Industry Co., Ltd.
- Zhejiang Hailiang Co. Ltd.
- Zhejiang Huamao International Co. Ltd.
- Zhejiang Laibao Hardware Co. Ltd.
- Zhejiang Machinery & Equipment Co. Ltd.
- Zhejiang Minmetals Sanhe Import & Export Co. Ltd.
- Zhejiang Morgan Brother
- Zhejiang New Oriental Fastener Co., Ltd.
- Zhejiang Peace Industry and Trading
- Zhejiang Xingxing Optoelectron
- Zhejiang Zhenglian Corp.

[FR Doc. 2011–11255 Filed 5–6–11; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Proposed Information Collection; Comment Request; Commercial Fishing Vessel Cost and Earnings Data Collection Survey in the Northeast Region

AGENCY: National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice.

SUMMARY: The Department of Commerce, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995.

DATES: Written comments must be submitted on or before July 8, 2011.

ADDRESSES: Direct all written comments to Diana Hynek, Departmental Paperwork Clearance Officer, Department of Commerce, Room 6616, 14th and Constitution Avenue, NW.,

Washington, DC 20230 (or via the Internet at *dHynek@doc.gov*).

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection instrument and instructions should be directed to Andrew Kitts, (508) 495–2231 or *akitts@mercury.wh.whoi.edu.*

SUPPLEMENTARY INFORMATION:

I. Abstract

This request is for a new information collection.

Economic data on the costs of operating commercial fishing businesses are needed by the National Marine Fisheries Service (NMFS) to meet the legislative requirements of the Magnuson-Stevens Fishery Conservation and Management Act, the National Environmental Policy Act, Executive Order 12866 and the Regulatory Flexibility Act. The Social Sciences Branch (SSB) of the NMFS, Northeast Fisheries Science Center (NEFSC) is responsible for estimating the economic and social impacts of fishery management actions.

Lack of information on vessel operating costs has severely limited the ability of the SSB to assess fishermen's behavioral responses to changes in regulations, fishing conditions, and market conditions. Establishing an on-going, consistent, data collection program will enable the SSB to provide a level of analysis that meets the needs of the New England Fishery Management Council, the Mid-Atlantic Fishery Management Council and NMFS, on behalf of the Secretary of Commerce, to make informed decisions about the expected economic effects of proposed management alternatives.

II. Method of Collection

The survey will be administered via mail and online. Vessel owners will receive a survey packet via mail, which will contain a password and a secured link to an online version of the survey. Vessel owners will be given the option of completing the survey online or by mail.

III. Data

OMB Control Number: None.

Form Number: NA.

Type of Review: Regular submission (request for a new information collection).

Affected Public: Individuals or households; business or other for-profit organizations.

Estimated Number of Respondents: 1,280.

Estimated Time per Response: 1 hour.

Estimated Total Annual Burden Hours: 1,280.

Estimated Total Annual Cost to Public: $0 in recordkeeping/reporting costs.

IV. Request for Comments

Comments are invited on:

(a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility;

(b) The accuracy of the agency's estimate of the burden (including hours and cost) of the proposed collection of information;

(c) Ways to enhance the quality, utility, and clarity of the information to be collected; and

(d) Ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology.

Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval of this information collection; they also will become a matter of public record.

Dated: May 4, 2011.

Gwellnar Banks,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. 2011–11214 Filed 5–6–11; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XA418

New England Fishery Management Council; Public Meeting

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice of a public meeting.

SUMMARY: The New England Fishery Management Council's (Council) Groundfish Committee will meet to consider actions affecting New England fisheries in the exclusive economic zone (EEZ).

DATES: The meeting will be held on Thursday, May 26, 2011 at 9 a.m.

ADDRESSES: The meeting will be held at the Crowne Plaza Boston North Shore, 50 Ferncroft Road, Danvers, MA 01923; *telephone:* (978) 777–2500; *fax:* (978) 750–7991.

Council address: New England Fishery Management Council, 50 Water Street, Mill 2, Newburyport, MA 01950.

FOR FURTHER INFORMATION CONTACT: Paul J. Howard, Executive Director, New England Fishery Management Council; *telephone:* (978) 465–0492.

SUPPLEMENTARY INFORMATION: The items of discussion in the committee's agenda are as follows:

The Groundfish Oversight Committee will meet to begin work on Framework Adjustment 47 (FW 47) to the Northeast Multispecies Fishery Management Plan. FW 47 will adopt Annual Catch Limits for fishing years 2012–2014 and will address several management issues. The Committee will discuss adjustments to accountability measures for windowpane flounder, ocean pout, Atlantic halibut, Atlantic wolffish, and SNE/MA winter flounder. They will also discuss modifications to the cap on yellowtail flounder that applies to the scallop fishery access areas in Closed Area I, Closed Area II, and the Nantucket Lightship Closed Area. The Committee will discuss whether changes are needed to the Georges Bank yellowtail flounder rebuilding strategy as a result of the International Fisheries Agreement Clarification Act. They will also review public comments on Amendment 17, an amendment that if approved will authorize state permit banks, and will consider making a recommendation to the Council for that amendment. The Committee will consider providing advice to the National Marine Fisheries Service to consider when making in-season adjustments to common pool trip limits and days-at-sea adjustments. Council staff will update the Committee on plans for a sector workshop. Other business may be discussed.

Although non-emergency issues not contained in this agenda may come before this group for discussion, those issues may not be the subject of formal action during this meeting. Action will be restricted to those issues specifically identified in this notice and any issues arising after publication of this notice that require emergency action under section 305(c) of the Magnuson-Stevens Fishery Conservation and Management Act, provided the public has been notified of the Council's intent to take final action to address the emergency.

Special Accommodations

This meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Paul J. Howard (see **ADDRESSES**) at least 5 days prior to the meeting date.

Authority: 16 U.S.C. 1801 *et seq.*

Dated: May 3, 2011.

Tracey L. Thompson,

Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 2011–11181 Filed 5–6–11; 8:45 am]

BILLING CODE 3510–22–P

COMMITTEE FOR PURCHASE FROM PEOPLE WHO ARE BLIND OR SEVERELY DISABLED

Appointments to Performance Review Board for Senior Executive Service

AGENCY: Committee for Purchase From People Who Are Blind or Severely Disabled.

ACTION: Appointment of Performance Review Board for Senior Executive Service.

SUMMARY: The Committee For Purchase from People Who Are Blind Or Severely Disabled (Committee) has announced the following appointments to the Committee Performance Review Board.

The following individuals are appointed as members of the Committee Performance Review Board responsible for making recommendations to the appointing and awarding authorities on performance appraisal ratings and performance awards for Senior Executive Service employees:

Perry E. Anthony, PhD, Deputy Commissioner, Rehabilitation Services Administration, Department of Education.

James H. Omvig, Sr., Private Citizen.

J. Anthony Poleo, Principal Deputy Comptroller, Defense Logistics Agency.

All appointments are made pursuant to Section 4314 of Chapter 43 of Title 5 of the United States Code.

DATES: *Effective Date:* May 10, 2010.

FOR FURTHER INFORMATION CONTACT: Patricia Briscoe, *Telephone:* (703) 603–7740, *Fax:* (703) 603–0655, or e-mail *CMTEFedReg@abilityone.gov.*

Patricia Briscoe,

Deputy Director, Business Operations (Pricing and Information Management).

[FR Doc. 2011–11221 Filed 5–6–11; 8:45 am]

BILLING CODE P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Transmittal Nos. 11–10]

36(b)(1) Arms Sales Notification

AGENCY: Defense Security Cooperation Agency, Department of Defense.

ACTION: Notice.

SUMMARY: The Department of Defense is publishing the unclassified text of a section 36(b)(1) arms sales notification. This is published to fulfill the requirements of section 155 of Public Law 104–164 dated 21 July 1996.

FOR FURTHER INFORMATION CONTACT: John Unglesbee, DSCA/DBO/CFM; Phone 703–601–6026.

SUPPLEMENTARY INFORMATION: The following is a copy of a letter to the Speaker of the House of Representatives, Transmittals 10–25 with attached transmittal, policy justification, and Sensitivity of Technology.

Dated: May 3, 2011.

Morgan F. Park,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

BILLING CODE 5001–06–P

DEFENSE SECURITY COOPERATION AGENCY
201 12TH STREET SOUTH, STE 203
ARLINGTON, VA 22202-5408

APR 18 2011

The Honorable John A. Boehner
Speaker of the House
U.S. House of Representatives
Washington, DC 20515

Dear Mr. Speaker:

Pursuant to the reporting requirements of Section 36(b)(1) of the Arms Export Control Act, as amended, we are forwarding herewith Transmittal No. 10-25, concerning the Department of the Navy's proposed Letter(s) of Offer and Acceptance to the United Arab Emirates for defense articles and services estimated to cost $251 million. After this letter is delivered to your office, we plan to issue a press statement to notify the public of this proposed sale.

Sincerely,

Richard A. Genaille, Jr.

Richard A. Genaille, Jr.
Deputy Director

Enclosures:
1. Transmittal
2. Policy Justification
3. Sensitivity of Technology
4. Regional Balance (Classified Document Provided Under Separate Cover)

Transmittal No. 10-25

Notice of Proposed Issuance of Letter of Offer
Pursuant to Section 36(b)(1)
of the Arms Export Control Act

(i) Prospective Purchaser: United Arab Emirates

(ii) Total Estimated Value:

Major Defense Equipment*	$ 200 million
Other	$ 51 million
TOTAL	$ 251 million

(iii) Description and Quantity or Quantities of Articles or Services under Consideration for Purchase: 218 AIM-9X-2 SIDEWINDER Block II Tactical Missiles, 40 CATM-9X-2 Captive Air Training Missiles (CATMs), 18 AIM-9X-2 WGU-51/B Tactical Guidance Units, 8 CATM-9X-2 WGU-51/B Guidance Units, 8 Dummy Air Training Missiles, containers, support and test equipment, spare and repair parts, publications and technical documentation, personnel training and training equipment, U.S. Government and contractor engineering and logistics support services, and other related elements of logistics support.

(iv) Military Department: Navy (ABA)

(v) Prior Related Cases, if any: None

(vi) Sales Commission, Fee, etc., Paid, Offered, or Agreed to be Paid: None

(vii) Sensitivity of Technology Contained in the Defense Article or Defense Services Proposed to be Sold: See Annex attached

(viii) Date Report Delivered to Congress: APR 18 2011

* as defined in Section 47(6) of the Arms Export Control Act.

POLICY JUSTIFICATION

United Arab Emirates – AIM-9X-2 SIDEWINDER Missiles

The Government of the United Arab Emirates has requested a possible sale of 218 AIM-9X-2 SIDEWINDER Block II Tactical Missiles, 40 CATM-9X-2 Captive Air Training Missiles (CATMs), 18 AIM-9X-2 WGU-51/B Tactical Guidance Units, 8 CATM-9X-2 WGU-51/B Guidance Units, 8 Dummy Air Training Missiles, containers, support and test equipment, spare and repair parts, publications and technical documentation, personnel training and training equipment, U.S. Government and contractor engineering and logistics support services, and other related elements of logistics support. The estimated cost is $251 million.

This proposed sale will contribute to the foreign policy and national security of the United States by helping to improve the security of a friendly country that has been and continues to be an important force for political stability and economic progress in the Middle East.

The proposed sale of the weapons will allow the United Arab Emirates to deploy aircraft to materially assist the U.S. in overseas contingency operations. The weapons will strengthen the effectiveness and interoperability of a potential coalition partner, reduce the dependence on U.S. forces in the region, and enhance any coalition operations the U.S. may undertake. The United Arab Emirates will have no difficulty absorbing these missiles into its armed forces.

The proposed sale of this weapon system will not alter the basic military balance in the region.

The prime contractor will be the Raytheon Missiles Systems Company in Tucson, Arizona. There are no known offset agreements proposed in connection with this potential sale.

Implementation of this proposed sale will not require the assignment of any additional U.S. Government or contractor representatives to the UAE.

There will be no adverse impact on U.S. defense readiness as a result of this proposed sale.

Transmittal No. 10-25

Notice of Proposed Issuance of Letter of Offer
Pursuant to Section 36(b)(1)
of the Arms Export Control Act

Annex
Item No. vii

(vii) Sensitivity of Technology:

1. The AIM-9X SIDEWINDER is a launch-and-leave air combat missile that uses passive infrared energy for acquisition and tracking which can be employed in near beyond visual range and within visual range arenas. It has a high off-boresight seeker, enhanced countermeasure rejection capability, low drag/high agile airframe with a fifth-generation seeker and thrust-vectoring control, and the ability to integrate the Joint Helmet Mounted Cueing System (JHMCS). The external view of the AIM-9X SIDEWINDER Missile is Unclassified. The software algorithms are the most sensitive portions of the AIM-9X missile. No software source code or algorithms will be released. The seeker/guidance and control section and the target detector are Confidential and contain sensitive state-of-the-art technology. Specifically, the infrared seeker sensitivity is a significant improvement over the previous AIM-9 variants. Manuals and technical documents for the AIM-9X that support the ability to integrate with aircraft sensors are classified up to Secret. Performance and operating logic of the counter-countermeasures circuits are Secret.

2. If a technologically advanced adversary were to obtain knowledge of the specific hardware in the proposed sale, the information could be used to develop countermeasures which might reduce weapons system effectiveness or be used in the development of a system with similar or advanced capabilities.

[FR Doc. 2011–11186 Filed 5–6–11; 8:45 am]
BILLING CODE 5001–06–C

DEPARTMENT OF DEFENSE

Office of the Secretary

[Docket ID DOD–2011–OS–0049]

Privacy Act of 1974; System of Records

AGENCY: Office of the Secretary, DoD.

ACTION: Notice to alter a system of records.

SUMMARY: The Office of the Secretary of Defense proposes to alter a system of records in its inventory of record systems subject to the Privacy Act of 1974 (5 U.S.C. 552a), as amended.

DATES: This proposed action would be effective without further notice on June 8, 2011 unless comments are received which result in a contrary determination.

ADDRESSES: You may submit comments, identified by docket number and/ Regulatory Information Number (RIN) and title, by any of the following methods:

* *Federal Rulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.

* *Mail:* Federal Docket Management System Office, 1160 Defense Pentagon, OSD Mailroom 3C843, Washington, DC 20301–1160.

Instructions: All submissions received must include the agency name and docket number or Regulatory Information Number (RIN) for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the Internet at *http://www.regulations.gov* as they are received without change, including any personal identifiers or contact information.

FOR FURTHER INFORMATION CONTACT: Ms. Cindy Allard at (703) 588–6830, or Chief, OSD/JS Privacy Office, Freedom of Information Directorate, Washington Headquarters Services, 1155 Defense Pentagon, Washington, DC 20301–1155.

SUPPLEMENTARY INFORMATION: The Office of the Secretary of Defense notices for systems of records subject to the Privacy Act of 1974 (5 U.S.C. 552a), as amended, have been published in the **Federal Register** and are available from the **FOR FURTHER INFORMATION CONTACT** address above.

The proposed system report, as required by 5 U.S.C. 552a(r) of the Privacy Act of 1974, as amended, was submitted on May 2, 2011, to the House Committee on Oversight and Government Reform, the Senate Committee on Governmental Affairs, and the Office of Management and Budget (OMB) pursuant to paragraph 4c of Appendix I to OMB Circular No. A–130, "Federal Agency Responsibilities for Maintaining Records About Individuals," dated February 8, 1996 (February 20, 1996, 61 FR 6427).

Dated: May 3, 2011.

Morgan F. Park,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

DEPARTMENT OF DEFENSE

Office of the Secretary of Defense

Narrative Statement on an Altered System of Records Under the Privacy Act of 1974

1. *System identifier and name:* DPFPA 01, entitled "Pentagon Facilities Access Control Systems."

2. *Responsible official:* Ms. Paula Jones-Griffin, Chief, Pentagon Access Control Division, Security Services Directorate, Pentagon Force Protection Agency, Room 1F1084, 9000 Defense Pentagon, Washington, DC 20301–9000, telephone (703) 693–2865.

3. *Nature of changes proposed for the system:* The Office of the Secretary of Defense proposes to change the system name, update the categories of individuals covered, categories of records, authorities, purpose, retrievability, safeguards, retention, system manager, notification, access, and record source sections.

4. *Authority for the maintenance of the system:* 10 U.S.C. 113, Secretary of Defense; 10 U.S.C. 2674, Operation and Control of Pentagon Reservation and Defense facilities in National Capital Region; DoD Directive 1000.25, DoD Personnel Identity Protection (PIP) Program; DoD Directive 5105.68, Pentagon Force Protection Agency (PFPA); DoD 5200.08–R, Physical Security Program; DoD Directive 8521.01E, Department of Defense Biometrics; Directive Type Memorandum 09–012, Interim Policy Guidance for DoD Physical Access Control; and E.O. 9397 (SSN), as amended.

5. *Probable or potential effects on the privacy of individuals:* None.

6. *Is the system, in whole or in part, being maintained by a contractor*? Yes.

7. *Steps taken to minimize risk of unauthorized access:* Records are maintained in secure, limited access, or monitored areas. Access to data is restricted through the use of Common Access Cards (CAC) along with passwords specific to the system. Data is encrypted, while being stored and transmitted. Physical entry to the Pentagon Access Control Division Office, server rooms and security equipment closets where information is stored or processed is restricted through the use of locks, guards, passwords, or other administrative procedures. Access to personal information is limited to those individuals who require the records to perform their official assigned duties.

8. *Routine use compatibility:* In addition to those disclosures generally permitted under 5 U.S.C. 552a(b) of the Privacy Act of 1974, these records may specifically be disclosed outside the DoD as a routine use pursuant to 5 U.S.C. 552a(b)(3) as follows:

The DoD 'Blanket Routine Uses' set forth at the beginning of the Office of the Secretary of Defense (OSD) compilation of systems of records notices apply to this system.

9. *OMB information collection requirements:* 0704–0328, expires 07/31/2011.

10. *Supporting documentation:* None.

11. *Name of the IT System:* Pentagon Facilities Access Control Systems.

DPFPA 01

SYSTEM NAME:

Department of Defense (DoD) Pentagon Building Pass Files (September 11, 2008, 73 FR 52840).

Changes:

* * * * *

SYSTEM NAME:

Delete entry and replace with "Pentagon Facilities Access Control System."

* * * * *

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Delete entry and replace with "Any Department of Defense military, civilian employee, or contractor sponsored by the Department of Defense, or other persons who have reason to enter Pentagon Facilities for official Department of Defense business."

CATEGORIES OF RECORDS IN THE SYSTEM:

Delete entry and replace with "File contains, name, Social Security Number (SSN), DoD ID number, date of birth, place of birth, height, weight, race, gender, biometric images and templates (e.g., fingerprint and iris), citizenship, name of DoD sponsoring office, access investigation completion date, access level, previous facility pass issuances, and authenticating official."

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

Delete entry and replace with "10 U.S.C. 113, Secretary of Defense; 10 U.S.C. 2674, Operation and Control of Pentagon Reservation and Defense

facilities in National Capital Region; DoD Directive 1000.25, DoD Personnel Identity Protection (PIP) Program; DoD Directive 5105.68, Pentagon Force Protection Agency; DoD 5200.08–R, Physical Security Program; DoD Directive 8521.01E, Department of Defense Biometrics; Directive Type Memorandum 09–012, Interim Policy Guidance for DoD Physical Access Control; and E.O. 9397 (SSN), as amended."

PURPOSE:

Delete entry and replace with "To maintain a listing of personnel who are authorized to access Pentagon Facilities and verify identity of approved individuals to access such facilities and offices."

* * * * *

RETRIEVABILITY:

Delete entry and replace with "By individual's name, SSN, or DoD ID number."

SAFEGUARDS:

Delete entry and replace with "Records are maintained in secure, limited access, or monitored areas. Access to data is restricted through the use of Common Access Cards (CAC) along with passwords specific to the system. Data is encrypted, while being stored and transmitted. Physical entry to the Pentagon Access Control Division Office, server rooms and security equipment closets where information is stored or processed is restricted through the use of locks, guards, passwords, or other administrative procedures. Access to personal information is limited to those individuals who require the records to perform their official assigned duties."

RETENTION AND DISPOSAL:

Delete entry and replace with "Applications and credentials are destroyed three (3) months after expiration or return to PFPA. Verification records are maintained for 3–5 years and then destroyed."

SYSTEM MANAGER(S) AND ADDRESS:

Delete entry and replace with "Chief, Pentagon Access Control Division, Security Services Directorate, Pentagon Force Protection Agency, Room 1F1084, 9000 Defense Pentagon, Washington, DC 20301–9000."

NOTIFICATION PROCEDURE:

Delete entry and replace with "Individuals seeking to determine if their information is contained in this system should address written inquiries to Pentagon Force Protection Agency, Security Services Directorate, Pentagon Access Control Division, 9000 Defense Pentagon, Washington, DC 20301–9000.

Written requests should contain the full name, SSN, DoD ID number, and current address and telephone number of the individual."

RECORD ACCESS PROCEDURES:

Delete entry and replace with "Individuals seeking access to their information contained in this system should address written inquiries to the Office of the Secretary of Defense/Joint Staff Freedom of Information Act Requester Service Center, Office of the Freedom of Information, 1155 Defense Pentagon, Washington, DC 20301–1155.

Written requests should contain the full name, SSN, DoD ID number, current address and telephone number of the individual, the name and number of this system of records notice, and be signed."

* * * * *

RECORD SOURCE CATEGORIES:

Delete entry and replace with "The individual, security managers, and the Joint Personnel Adjudication System."

* * * * *

DPFPA 01

SYSTEM NAME:

Pentagon Facilities Access Control Systems.

SYSTEM LOCATION:

Pentagon Force Protection Agency (PFPA), Security Services Directorate, Pentagon Access Control Division, 9000 Defense Pentagon, Washington, DC 20301–9000.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Any Department of Defense military, civilian employee, or contractor sponsored by the Department of Defense, or other persons who have reason to enter Pentagon Facilities for official Department of Defense business.

CATEGORIES OF RECORDS IN THE SYSTEM:

File contains, name, Social Security Number (SSN), DoD ID number, date of birth, place of birth, height, weight, race, gender, biometric images and templates (*e.g.,* fingerprint and iris), citizenship, name of DoD sponsoring office, access investigation completion date, access level, previous facility pass issuances, and authenticating official.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

10 U.S.C. 113, Secretary of Defense; 10 U.S.C. 2674, Operation and Control of Pentagon Reservation and Defense facilities in National Capital Region; DoD Directive 1000.25, DoD Personnel Identity Protection (PIP) Program; DoD Directive 5105.68, Pentagon Force Protection Agency; DoD 5200.08–R, Physical Security Program; DoD Directive 8521.01E, Department of Defense Biometrics; Directive Type Memorandum 09–012, Interim Policy Guidance for DoD Physical Access Control; and E.O. 9397 (SSN), as amended.

PURPOSE:

To maintain a listing of personnel who are authorized to access Pentagon Facilities and verify identity of approved individuals to access such facilities and offices.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

In addition to those disclosures generally permitted under 5 U.S.C. 552a(b) of the Privacy Act of 1974, these records may specifically be disclosed outside the DoD as a routine use pursuant to 5 U.S.C. 552a(b)(3) as follows:

The DoD "Blanket Routine Uses" set forth at the beginning of the Office of the Secretary of Defense (OSD) compilation of systems of records notices apply to this system.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

Paper records in file folders and electronic storage media.

RETRIEVABILITY:

By individual's name, SSN, or DoD ID number.

SAFEGUARDS:

Records are maintained in secure, limited access, or monitored areas. Access to data is restricted through the use of Common Access Cards (CAC) along with passwords specific to the system. Data is encrypted, while being stored and transmitted. Physical entry to the Pentagon Access Control Division Office, server rooms and security equipment closets where information is stored or processed is restricted through the use of locks, guards, passwords, or other administrative procedures. Access to personal information is limited to those individuals who require the records to perform their official assigned duties.

RETENTION AND DISPOSAL:

Applications and credentials are destroyed three (3) months after expiration or return to PFPA. Verification records are maintained for 3–5 years and then destroyed.

SYSTEM MANAGER(S) AND ADDRESS:

Chief, Pentagon Access Control Division, Security Services Directorate, Pentagon Force Protection Agency, Room 1F1084, 9000 Defense Pentagon, Washington, DC 20301–9000.

NOTIFICATION PROCEDURE:

Individuals seeking to determine if their information is contained in this system should address written inquiries to Pentagon Force Protection Agency, Security Services Directorate, Pentagon Access Control Division, 9000 Defense Pentagon, Washington, DC 20301–9000.

Written requests should contain the full name, SSN, DoD ID number, and current address and telephone number of the individual.

RECORD ACCESS PROCEDURES:

Individuals seeking access to their information contained in this system should address written inquiries to the Office of the Secretary of Defense/Joint Staff Freedom of Information Act Requester Service Center, Office of the Freedom of Information, 1155 Defense Pentagon, Washington, DC 20301–1155.

Written requests should contain the full name, SSN, DoD ID number, current address and telephone number of the individual, the name and number of this system of records notice, and be signed.

CONTESTING RECORD PROCEDURES:

The OSD rules for accessing records, for contesting contents and appealing initial agency determinations are published in OSD Administrative Instruction 81; 32 CFR Part 311; or may be obtained from the system manager.

RECORD SOURCE CATEGORIES:

The individual, security managers, and the Joint Personnel Adjudication System.

EXEMPTIONS CLAIMED FOR THE SYSTEM:

None.

[FR Doc. 2011–11159 Filed 5–6–11; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Docket ID: DOD–2011–OS–0050]

Privacy Act of 1974; Systems of Records

AGENCY: Defense Logistics Agency, DoD.

ACTION: Notice to Delete a System of Records.

SUMMARY: The Defense Logistics Agency proposes to delete a system of records notice in its existing inventory of records systems subject to the Privacy Act of 1974, (5 U.S.C. 552a), as amended.

DATES: This proposed action will be effective without further notice on June 8, 2011 unless comments are received which result in a contrary determination.

ADDRESSES: You may submit comments, identified by dock number and/RIN number and title, by any of the following methods:

* *Federal Rulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.

* *Mail:* Federal Docket Management System Office, 1160 Defense Pentagon, OSD Mailroom 3C843, Washington, DC 20301–1160.

Instructions: All submissions received must include the agency name and docket number or Regulatory Information Number (RIN) for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the Internet at *http://www.regulations.gov* as they are received without change, including any personal identifiers or contact information.

FOR FURTHER INFORMATION CONTACT: Jody Sinkler at (703) 767–5045, or Chief Privacy and FOIA Officer, Headquarters Defense Logistics Agency, ATTN: DGA, 8725 John J. Kingman Road, Suite 1644, Fort Belvoir, VA 22060–6221.

SUPPLEMENTARY INFORMATION: The Defense Logistics Agency systems of records notices subject to the Privacy Act of 1974, (5 U.S.C. 552a), as amended, have been published in the **Federal Register** and are available from the **FOR FURTHER INFORMATION CONTACT** address above.

The specific changes to the record system being amended are set forth below followed by the notice, as amended, published in its entirety. The proposed amendment is not within the purview of subsection (r) of the Privacy Act of 1974 (5 U.S.C. 552a), as amended, which requires the submission of new or altered systems reports.

Dated: May 3, 2011.

Morgan F. Park,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

DELETION:

SYSTEM IDENTIFIER AND NAME:

S170.06, Legal Assistance (November 12, 2008; 73 FR 66860).

REASON:

DLA Land and Maritime no longer provides legal assistance to service members; therefore, this notice is being deleted from the DLA inventory of systems of records. Service members seeking legal assistance are referred to Wright-Patterson Air Force Base.

[FR Doc. 2011–11184 Filed 5–6–11; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Department of the Army

[Docket ID USA–2011–0010]

Privacy Act of 1974; System of Records

AGENCY: Department of the Army, DoD.

ACTION: Notice to alter a system of records.

SUMMARY: Department of the Army is altering a system of records notice in its existing inventory of record systems subject to the Privacy Act of 1974, (5 U.S.C. 552a), as amended.

DATES: This proposed action will be effective without further notice on June 8, 2011 unless comments are received which result in a contrary determination.

ADDRESSES: You may submit comments, identified by docket number and/ Regulatory Information Number (RIN) and title, by any of the following methods:

• *Federal Rulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.

• *Mail:* Federal Docket Management System Office, 1160 Defense Pentagon, OSD Mailroom 3C843, Washington, DC 20301–1160.

Instructions: All submissions received must include the agency name and docket number or Regulatory Information Number (RIN) for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the Internet at *http://www.regulations.gov* as they are received without change, including any personal identifiers or contact information.

FOR FURTHER INFORMATION CONTACT: Mr. Leroy Jones at (703) 428–6185, or Department of the Army, Privacy Office, U.S. Army Records Management and Declassification Agency, 7701 Telegraph Road, Casey Building, Suite 144, Alexandria, VA 22325–3905.

SUPPLEMENTARY INFORMATION:

Department of the Army notices for systems of records subject to the Privacy Act of 1974 (5 U.S.C. 552a), as amended, have been published in the **Federal**

Register and are available from the **FOR FURTHER INFORMATION CONTACT** address above.

The proposed system report, as required by 5 U.S.C. 552a(r) of the Privacy Act of 1974, as amended, was submitted on May 3, 2011 to the House Committee on Government Reform, the Senate Committee on Homeland Security and Governmental Affairs, and the Office of Management and Budget (OMB) pursuant to paragraph 4c of Appendix I to OMB Circular No. A–130, "Federal Agency Responsibilities for Maintaining Records About Individuals," February 20, 1996, 61 FR 6427.

Dated: May 3, 2011.

Morgan F. Park,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

A0350–1b TRADOC

SYSTEM NAME:

Army Career Tracker (ACT) (April 30, 2009, 74 FR 19951.)

Changes:

* * * * *

SYSTEM LOCATION:

Delete entry and replace with "Army commands, installations and activities. Addresses for the above may be obtained from the Commander, Headquarters, U.S. Army Training and Doctrine Command, Institute of Noncommissioned Officer Professional Development Office (ATCG–NCN), 5A North Gate Road, Fort Monroe, VA 23651–1048."

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Delete entry and replace with "Department of the Army military members and government civilians employed by the Army."

CATEGORIES OF RECORDS IN THE SYSTEM:

Delete entry and replace with "Course and training data to include name, grade/rank/series, Social Security Number (SSN), address, service component, branch, personnel classification, military status, military occupational specialty, credit hours accumulated, examination and lesson course completion status, assignment history, student academic status, curricula, course description, scheduling, testing, academic, graduation, individual goals, personnel and attrition data."

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

Delete entry and replace with "10 U.S.C. 3013, Secretary of the Army; Army Regulation 350–1, Army Training and Leader Development; and E.O. 9397 (SSN), as amended."

* * * * *

SYSTEM MANAGER(S) AND ADDRESS:

Delete entry and replace with "Commander, Headquarters, U.S. Army Training and Doctrine Command, Institute of Noncommissioned Officer Professional Development Office (ATCG–NCN), 5A North Gate Road, Fort Monroe, VA 23651–1048."

NOTIFICATION PROCEDURE:

Delete entry and replace with "Individuals seeking to determine if information about themselves is contained in this system should address written inquiries to the Commander, Headquarters, U.S. Army Training and Doctrine Command, Institute of Noncommissioned Officer Professional Development Office (ATCG–NCN), 5A North Gate Road, Fort Monroe, VA 23651–1048.

Individual should provide full name, Social Security Number (SSN) and military status or other information verifiable from the record itself.

In addition, the requester must provide a notarized statement or an unsworn declaration made in accordance with 28 U.S.C. 1746, in the following format:

If executed outside the United States: 'I declare (or certify, verify, or state) under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on (date). (Signature)'.

If executed within the United States, its territories, possessions, or commonwealths: 'I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on (date). (Signature)'."

RECORD ACCESS PROCEDURES:

Delete entry and replace with "Individuals seeking access to information about themselves contained in this system should address written inquiries to the Commander, Headquarters, U.S. Army Training and Doctrine Command, Institute of Noncommissioned Officer Professional Development Office (ATCG–NCN), 5A North Gate Road, Fort Monroe, VA 23651–1048.

Individual should provide full name, Social Security Number (SSN) and military status or other information verifiable from the record itself.

In addition, the requester must provide a notarized statement or an unsworn declaration made in accordance with 28 U.S.C. 1746, in the following format:

If executed outside the United States: 'I declare (or certify, verify, or state) under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on (date). (Signature)'.

If executed within the United States, its territories, possessions, or commonwealths: 'I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on (date). (Signature)'."

* * * * *

A0350–1b TRADOC

SYSTEM NAME:

Army Career Tracker (ACT).

SYSTEM LOCATION:

Army commands, installations and activities. Addresses for the above may be obtained from the Commander, Headquarters, U.S. Army Training and Doctrine Command, Institute of Noncommissioned Officer Professional Development Office (ATCG–NCN), 5A North Gate Road, Fort Monroe, VA 23651–1048.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Department of the Army military members and government civilians employed by the Army.

CATEGORIES OF RECORDS IN THE SYSTEM:

Course and training data to include name, grade/rank/series, Social Security Number (SSN), address, service component, branch, personnel classification, military status, military occupational specialty, credit hours accumulated, examination and lesson course completion status, assignment history, student academic status, curricula, course description, scheduling, testing, academic, graduation, individual goals, personnel and attrition data.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

10 U.S.C. 3013, Secretary of the Army; Army Regulation 350–1, Army Training and Leader Development; and E.O. 9397 (SSN), as amended.

PURPOSE(S):

The Army Career Tracker will receive training, education, experiential learning, personal and biographical data from several Army information systems and present a comprehensive and personalized view of Noncommissioned Officer, Officer, and Army civilian career history, course enrollment, course completion, and course catalog information.

Routine uses of records maintained in the system, including categories of users and the purposes of such uses:

In addition to those disclosures generally permitted under 5 U.S.C.

552a(b) of the Privacy Act if 1974, these records contained therein may specifically be disclosed outside the DoD as a routine use pursuant to 5 U.S.C. 552a(b)(3) as follows:

The DoD 'Blanket Routine Uses' set forth at the beginning of the Army's compilation of systems of records notices also apply to this system.

Policies and practices for storing, retrieving, accessing, retaining, and disposing of records in the system:

STORAGE:

Paper printouts and electronic storage media.

RETRIEVABILITY:

Individual's name (Army Knowledge Online User Identification).

SAFEGUARDS:

Access to the system is restricted to authorized personnel only with Army Knowledge Online sign-on and password authorization. Records are maintained within secured buildings in areas accessible only to persons having an official need-to-know and who therefore are properly trained and screened.

RETENTION AND DISPOSAL:

Records on local training and individual goals are maintained until no longer needed for conducting business, but not longer than 6 years, then destroyed. Destroy electronic media by deletion; destroy paper printout by shredding or burning.

SYSTEM MANAGER(S) AND ADDRESS:

Commander, Headquarters, U.S. Army Training and Doctrine Command, Institute of Noncommissioned Officer Professional Development Office (ATCG–NCN), 5A North Gate Road, Fort Monroe, VA 23651–1048.

NOTIFICATION PROCEDURE:

Individuals seeking to determine if information about themselves is contained in this system should address written inquiries to the Commander, Headquarters, U.S. Army Training and Doctrine Command, Institute of Noncommissioned Officer Professional Development Office (ATCG–NCN), 5A North Gate Road, Fort Monroe, VA 23651–1048.

Individual should provide full name, Social Security Number (SSN) and military status or other information verifiable from the record itself.

In addition, the requester must provide a notarized statement or an unsworn declaration made in accordance with 28 U.S.C. 1746, in the following format:

If executed outside the United States: 'I declare (or certify, verify, or state) under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on (date). (Signature)'.

If executed within the United States, its territories, possessions, or commonwealths: 'I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on (date). (Signature)'.

RECORD ACCESS PROCEDURES:

Individuals seeking access to information about themselves contained in this system should address written inquiries to the Commander, Headquarters, U.S. Army Training and Doctrine Command, Institute of Noncommissioned Officer Professional Development Office (ATCG–NCN), 5A North Gate Road, Fort Monroe, VA 23651–1048.

Individual should provide full name, Social Security Number (SSN) and military status or other information verifiable from the record itself.

In addition, the requester must provide a notarized statement or an unsworn declaration made in accordance with 28 U.S.C. 1746, in the following format:

If executed outside the United States: 'I declare (or certify, verify, or state) under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on (date). (Signature)'.

If executed within the United States, its territories, possessions, or commonwealths: 'I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on (date). (Signature)'.

CONTESTING RECORD PROCEDURES:

The Army's rules for accessing records, contesting contents and appealing initial agency determinations are contained in Army Regulation 340–21; 32 CFR part 505; or may be obtained from the system manager.

RECORD SOURCE CATEGORIES:

Information is received from the individual, DoD staff, and personnel and training systems.

EXEMPTIONS CLAIMED FOR THE SYSTEM:

None.

[FR Doc. 2011–11185 Filed 5–6–11; 8:45 am]

BILLING CODE 5001–06–P

DEFENSE NUCLEAR FACILITIES SAFETY BOARD

Sunshine Act Meeting

AGENCY: Defense Nuclear Facilities Safety Board.

ACTION: Notice of public meeting.

SUMMARY: Pursuant to the provisions of the Government in the Sunshine Act, 5 U.S.C. 552b, and as authorized by 42 U.S.C. 2286b, notice is hereby given of the Defense Nuclear Facilities Safety Board's (Board) public meeting and hearing.

FEDERAL REGISTER CITATIONS OF PREVIOUS ANNOUNCEMENTS 76 FR 11764 (March 3, 2011) and 76 FR 17627 (March 30, 2011).

PREVIOUSLY ANNOUNCED DATE AND TIME OF THE MEETING March 31, 2011, 9 a.m.

NEW DATE AND TIME OF THE MEETING May 25, 2011. Session I: 9 a.m.–11:45 a.m.; Session II: 1:30 p.m.–4:30 p.m.

CHANGES IN THE MEETING On May 25, 2011, the Board will hear from Department of Energy and National Nuclear Security Administration senior leaders concerning federal safety management and oversight policies being developed. This testimony was previously scheduled for the March 31, 2011 public meeting and hearing. The meeting and hearing will be held at the Defense Nuclear Facilities Safety Board, Public Hearing Room, 625 Indiana Avenue, NW., Suite 300, Washington, DC 20004–2901. The meeting and hearing will be presented live through audio streaming. A link to the presentation will be available on the Board's Web site (*http://www.dnfsb.gov*).

FOR FURTHER INFORMATION CONTACT: Brian Grosner, General Manager, Defense Nuclear Facilities Safety Board, 625 Indiana Avenue, NW., Suite 700, Washington, DC 20004–2901, (800) 788–4016. This is a toll-free number.

SUPPLEMENTARY INFORMATION: As previously announced, requests to speak may be submitted in writing or by telephone. Those who contact the Board prior to the close of business on May 24, 2011 will be scheduled for time slots beginning at approximately 3:30 p.m. Also, the Board will hold the record open until June 27, 2011 for the receipt of additional materials.

Dated: May 5, 2011.

Peter S. Winokur,

Chairman.

[FR Doc. 2011–11391 Filed 5–5–11; 4:15 pm]

BILLING CODE 3670–01–P

DEPARTMENT OF EDUCATION

Notice of Submission for OMB Review

AGENCY: Department of Education.

ACTION: Comment request.

SUMMARY: The Director, Information Collection Clearance Division, Privacy, Information and Records Management Services, Office of Management, invites comments on the submission for OMB review as required by the Paperwork Reduction Act of 1995 (Pub. L. 104–13).

DATES: Interested persons are invited to submit comments on or before June 8, 2011.

ADDRESSES: Written comments should be addressed to the Office of Information and Regulatory Affairs, *Attention:* Education Desk Officer, Office of Management and Budget, 725 17th Street, NW., Room 10222, New Executive Office Building, Washington, DC 20503, be faxed to (202) 395–5806 or e-mailed to *oira_submission@omb.eop.gov* with a cc: to *ICDocketMgr@ed.gov.* Please note that written comments received in response to this notice will be considered public records.

SUPPLEMENTARY INFORMATION: Section 3506 of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35) requires that the Office of Management and Budget (OMB) provide interested Federal agencies and the public an early opportunity to comment on information collection requests. The OMB is particularly interested in comments which: (1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) Enhance the quality, utility, and clarity of the information to be collected; and (4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

Dated: May 3, 2011.

Darrin A. King,

Director, Information Collection Clearance Division, Privacy, Information and Records Management Services, Office of Management.

Institute of Education Sciences

Type of Review: Revision.

Title of Collection: U.S. Department of Education, Institute of Education Sciences Research Performance Progress Report.

OMB Control Number: 1850–0881.

Agency Form Number(s): N/A.

Frequency of Responses: Annually.

Affected Public: State, Local, or Tribal Government, State Educational Agencies or Local Education Agencies.

Total Estimated Number of Annual Responses: 766.

Total Estimated Annual Burden Hours: 12,256.

Abstract: The Research Performance Progress Report (RPPR) format and instructions are used in order for Institute of Education Sciences' grantees to meet the established due dates for submission of performance reports for IES discretionary grant programs. Recipients of multi-year discretionary grants must submit an annual performance report for each year funding has been approved in order to receive a continuation award. The annual performance report should demonstrate whether substantial progress has been made toward meeting the approved goals and objectives of the project. The Institute also requires recipients of "forward funded" grants that are awarded funds for their entire multi-year project up-front in a single grant award to submit the RPPR on an annual basis. In addition, the Institute will require recipients to use the ED 524B to submit their final performance reports to demonstrate project success, impact and outcomes. In both the annual and final performance reports, grantees are required to provide data on established performance measures for the grant program (*e.g.,* Government Performance and Results Act measures) and on project performance measures that were included in the grantee's approved grant application. The RPPR will contain research and related (total Federal and non-Federal) budgetary forms that will be used to collect budgetary data from the recipient organization. The information submitted will be used to conduct periodic administrative/budgetary reviews. Performance reporting requirements are found in 34 CFR 74.51, 75.118, 75.253, 75.590 and 80.40 of the Education Department General Administrative Regulations.

Copies of the information collection submission for OMB review may be accessed from the RegInfo.gov Web site at *http://www.reginfo.gov/public/do/PRAMain* or from the Department's Web site at *http://edicsweb.ed.gov,* by selecting the "Browse Pending Collections" link and by clicking on link number 4514. When you access the information collection, click on "Download Attachments" to view. Written requests for information should be addressed to U.S. Department of Education, 400 Maryland Avenue, SW., LBJ, Washington, DC 20202–4537. Requests may also be electronically mailed to the Internet address *ICDocketMgr@ed.gov* or faxed to 202–401–0920. Please specify the complete title of the information collection and OMB Control Number when making your request.

Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339.

[FR Doc. 2011–11144 Filed 5–6–11; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

Notice of Submission for OMB Review

Correction

In notice document 2011–10723 appearing on pages 24868–24869 in the issue of May 3, 2011, make the following correction:

On page 24868, in the third column, under the **DATES** heading, in the second and third lines "[insert the 30th day after publication of this notice]" should read "June 2, 2011".

[FR Doc. C1–2011–10723 Filed 5–6–11; 8:45 am]

BILLING CODE 1505–01–D

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. PR11–102–001]

NorthWestern Corporation; Notice of Baseline Filing

Take notice that on April 29, 2011, NorthWestern Corporation submitted a revised baseline filing of their Statement of Operating Conditions for services provided under Section 311 of the Natural Gas Policy Act of 1978 ("NGPA").

Any person desiring to participate in this rate proceeding must file a motion to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed on or before the date as indicated below. Anyone filing an intervention or protest must serve a copy of that document on the Applicant.

Anyone filing an intervention or protest on or before the intervention or protest date need not serve motions to intervene or protests on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the "eFiling" link at *http://www.ferc.gov.* Persons unable to file electronically should submit an original and 7 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov,* using the "eLibrary" link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an "eSubscription" link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov,* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Comment Date: 5 p.m. Eastern Time on Tuesday, May 10, 2011.

Dated: May 3, 2011.

Kimberly D. Bose,

Secretary.

[FR Doc. 2011–11230 Filed 5–6–11; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 12611–005]

Verdant Power, LLC; Notice of Availability of Environmental Assessment

In accordance with the National Environmental Policy Act of 1969 and the Federal Energy Regulatory Commission's (Commission or FERC's) regulations, 18 CFR part 380 (Order No. 486, 52 FR 47897), the Office of Energy Projects has reviewed Verdant Power, LLC's application for a 10-year pilot project license for the Roosevelt Island Tidal Energy Project (FERC Project No. 12611–005), which would be located on the East River in New York County, New York.

Staff have prepared an environmental assessment (EA), which analyzes the potential environmental effects of licensing the project and concludes that licensing the project, with appropriate environmental protective measures, would not constitute a major Federal action that would significantly affect the quality of the human environment.

A copy of the EA is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site at *http://www.ferc.gov* using the "eLibrary" link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll-free at 1–866–208–3676, or for TTY, 202–502–8659.

You may also register online at *http://www.ferc.gov/docs-filing/esubscription.asp* to be notified via e-mail of new filings and issuances related to this or other pending projects. For assistance, contact FERC Online Support.

Any comments should be filed within 30 days from the date of this notice. Comments may be filed electronically via the Internet. See 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site (*http://www.ferc.gov/docs-filing/ferconline.asp*) under the "eFiling" link. Commenters can submit brief comments up to 6,000 characters, without prior registration, using the eComment system at *http://www.ferc.gov/docs-filing/ecomment.asp.* You must include your name and contact information at the end of your comments. For assistance, please contact FERC Online Support. Although the Commission strongly encourages electronic filings, documents may also be paper-filed. To paper-file, mail an original and seven copies to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426. Please affix Project No. 12611–005 to all comments.

For further information, contact Timothy Konnert by telephone at 202–502–6359 or by e-mail at *timothy.konnert@ferc.gov.*

Dated: May 3, 2011.

Kimberly D. Bose,

Secretary.

[FR Doc. 2011–11231 Filed 5–6–11; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 12478–003 Montana]

Gibson Dam Hydroelectric Company, LLC; Notice of Availability of Draft Environmental Assessment

In accordance with the National Environmental Policy Act of 1969 and the Federal Energy Regulatory Commission's (Commission) regulations, 18 CFR part 380 (Order No. 486, 52 FR 47897), the Office of Energy Projects has reviewed the application for license for the Gibson Dam Hydroelectric Project, located at the U.S. Department of the Interior, Bureau of Reclamation's, Gibson dam on the Sun River in Lewis and Clark and Teton Counties, Montana, and has prepared a draft environmental assessment (EA) for the project. The project would occupy a total of 68.5 acres of Federal lands.

The draft EA contains staff's analysis of the potential environmental impacts of the project and concludes that licensing the project, with appropriate environmental protective measures, would not constitute a major Federal action that would significantly affect the quality of the human environment.

A copy of the draft EA is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site at *http://www.ferc.gov* using the "eLibrary" link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll-free at 1–866–208–3676, or for TTY, (202) 502–8659.

You may also register online at *http://www.ferc.gov/docs-filing/esubscription.asp* to be notified via e-mail of new filings and issuances related to this or other pending projects. For assistance, contact FERC Online Support.

Any comments should be filed within 30 days from the date of this notice. Comments may be filed electronically via the Internet. See 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site *http://www.ferc.gov/docs-filing/efiling.asp.* Commenters can submit brief comments up to 6,000 characters, without prior registration, using the eComment system at *http://www.ferc.gov/docs-filing/ecomment.asp.* You must include your name and contact information at the end of your comments. For assistance, please contact FERC Online Support.

Although the Commission strongly encourages electronic filing, documents may also be paper-filed. To paper-file, mail an original and seven copies to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

For further information, contact Matt Cutlip at 503–552–2762 or *matt.cutlip@ferc.gov.*

Dated: May 3, 2011.

Kimberly D. Bose,

Secretary.

[FR Doc. 2011–11234 Filed 5–6–11; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER11–2256–000]

California Independent System Operator Corporation; Notice Establishing Comment Periods

This notice establishes the comment periods for the technical conference which was held on April 28, 2011, to discuss issues related to California Independent System Operator Corporation's (CAISO) Capacity Procurement Mechanism (CPM) compensation methodology and exceptional dispatch mitigation provisions.[1] All parties are invited to submit initial comments on or before Friday, May 27, 2011, and initial comments are requested to be no longer than 25 pages. Reply comments are due on or before Wednesday, June 15, 2011, and are requested to be no longer than 15 pages.

For more information, please contact Katheryn Hoke at *Katheryn.hoke@ferc.gov* or (202) 502–8404, or Colleen Farrell at *Colleen.farrell@ferc.gov* or (202) 502–6751.

Dated: May 3, 2011.

Kimberly D. Bose,

Secretary.

[FR Doc. 2011–11235 Filed 5–6–11; 8:45 am]

BILLING CODE 6717–01–P

[1] *Cal. Indep. Sys. Operator Corp.,* 134 FERC ¶ 61,211, at P2 (2011).

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. PR11–80–001]

Washington 10 Storage Corporation; Notice of Filing

Take notice that on April 29, 2011, Washington 10 Storage Corporation (Washington 10) filed a revised Statement of Operating Conditions (SOC) to comply with an April 25, 2011, Commission Order (135 FERC ¶ 61,071 (2011)). Washington 10 was directed to (1) withdraw proposed revisions to sections 3.12, 4.8, and 4.11 relating to the "confiscation of a shipper's gas if the customer has a negative balance in its PAL account at the end of a firm or interruptible PAL service agreement or if a shipper fails to return loaned quantities of gas on a Critical Day;" and (2) revise section 9.5 to "confirm that the limitation on injections and withdrawals would only apply to same-cycle activity," as more fully described in the filing.

Any person desiring to participate in this rate filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed on or before the date as indicated below. Anyone filing an intervention or protest must serve a copy of that document on the Applicant. Anyone filing an intervention or protest on or before the intervention or protest date need not serve motions to intervene or protests on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the "eFiling" link at *http://www.ferc.gov.* Persons unable to file electronically should submit an original and 7 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov,* using the "eLibrary" link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an "eSubscription" link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov,* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Comment Date: 5 p.m. Eastern Time on Tuesday, May 10, 2011.

Dated: May 3, 2011.

Kimberly D. Bose,

Secretary.

[FR Doc. 2011–11233 Filed 5–6–11; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. PR10–126–001]

The East Ohio Gas Company; Notice of Filing

Take notice that on April 29, 2011, The East Ohio Gas Company filed a revised Statement of Operating Conditions to comply with an unpublished Delegated letter order issued on April 19, 2011.

Any person desiring to participate in this rate filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed on or before the date as indicated below. Anyone filing an intervention or protest must serve a copy of that document on the Applicant. Anyone filing an intervention or protest on or before the intervention or protest date need not serve motions to intervene or protests on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the "eFiling" link at *http://www.ferc.gov.* Persons unable to file electronically should submit an original and 7 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov,* using the "eLibrary" link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an "eSubscription" link on the

Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov,* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Comment Date: 5 p.m. Eastern Time on Tuesday, May 10, 2011.

Dated: May 3, 2011.

Kimberly D. Bose,

Secretary.

[FR Doc. 2011–11232 Filed 5–6–11; 8:45 am]

BILLING CODE 6717–01–P

ENVIRONMENTAL PROTECTION AGENCY

[ER–FRL–8996–9]

Notice of Intent: Designation of an Expanded Ocean Dredged Material Disposal Site (ODMDS) off Fort Lauderdale, FL

AGENCY: U.S. Environmental Protection Agency (EPA) Region 4.

ACTION: Notice of Intent to prepare an Environmental Assessment (EA) for the designation of an expanded ODMDS off Fort Lauderdale, FL.

Purpose: EPA has the authority to designate ODMDSs under Section 102 of the Marine Protection, Research and Sanctuaries Act of 1972 (33 U.S.C 1401 *et. seq*). It is EPA's policy to prepare a National Environmental Policy Document for all ODMDS designations (63 FR 58045, October 1998).

For Further Information, to Submit Comments, and to Be Placed on the Project Mailing List Contact: Mr. Christopher McArthur, EPA Region 4, 61 Forsyth Street, Atlanta, Georgia 30303, phone 404–562–9391, *e-mail: mcarthur.christopher@epa.gov.*

SUMMARY: EPA, in cooperation with the U.S. Army Corps of Engineers Jacksonville District (USACE), intends to prepare an EA to designate an expanded ODMDS off shore of Fort Lauderdale, Florida. An EA is needed to provide the environmental information necessary to evaluate the potential environmental impacts associated with expanding the ODMDS.

Need for Action: The USACE has requested that EPA designate an expanded ODMDS, approximately 4 square nautical miles in size, for the disposal of dredged material from the potential construction dredging at Port Everglades Harbor. The need for an expanded ODMDS is based on capacity computer modeling results.

Alternatives: The following proposed alternatives have been tentatively defined:

1. No action.

2. Expansion of the existing Port Everglades Harbor ODMDS.

3. Expand the existing ODMDS to the north and west.

Scoping: EPA is requesting written comments from federal, state, and local governments, industry, non-governmental organizations, and the general public on the range of alternatives considered, specific environmental issues to be evaluated, and the potential impacts of the alternatives. Scoping comments will be accepted for 60 days, beginning with the date of this Notice. A public scoping meeting was held in Fort Lauderdale, Florida on March 31, 2011.

Estimated Date of Draft EA Release: March 2012.

Responsible Official: Gwendolyn Keyes Fleming, Regional Administrator, Region 4.

Dated: May 4, 2011.

Susan E. Bromm,

Director, Office of Federal Activities.

[FR Doc. 2011–11194 Filed 5–6–11; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–9303–2]

2011 Annual Meeting of the Ozone Transport Commission

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of meeting.

SUMMARY: The United States Environmental Protection Agency is announcing the 2011 Annual Meeting of the Ozone Transport Commission (OTC). This OTC meeting will explore options available for reducing ground-level ozone precursors in a multi-pollutant context. The Commission will be evaluating potential measures and considering actions in areas such as performance standards for electric generating units (EGUs) on high electric demand days, oil and gas boilers serving EGUs, small natural gas boilers, stationary generators, energy security/energy efficiency, architectural industrial and maintenance coatings, consumer products, institution commercial and industrial (ICI) boilers, vapor recovery at gas stations, large above ground storage tanks, seaports, aftermarket catalysts, lightering, and non-road idling.

DATES: The meeting will be held on June 15, 2011 starting at 9 a.m. and ending at 3:30 p.m.

Location: Washington Marriott Wardman Park, 2660 Woodley Road NW., Washington, DC 20008–4106; (202) 328–2000 or (800) 228–9290.

FOR FURTHER INFORMATION CONTACT: *For documents and press inquiries contact:* Ozone Transport Commission, 444 North Capitol Street, NW., Suite 638, Washington, DC 20001; (202) 508–3840; e-mail: *ozone@otcair.org;* Web site: *http://www.otcair.org.*

SUPPLEMENTARY INFORMATION: The Clean Air Act Amendments of 1990 contain at Section 184 provisions for the Control of Interstate Ozone Air Pollution. Section 184(a) establishes an Ozone Transport Region (OTR) comprised of the States of Connecticut, Delaware, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Pennsylvania, Rhode Island, Vermont, parts of Virginia and the District of Columbia. The purpose of the OTC is to deal with ground-level ozone formation, transport, and control within the OTR.

Type of Meeting: Open.

Agenda: Copies of the final agenda will be available from the OTC office (202) 508–3840; by e-mail: *ozone@otcair.org* or via the OTC Web site at *http://www.otcair.org.*

Dated: April 20, 2011.

Shawn M. Garvin,

Regional Administrator, Region III.

[FR Doc. 2011–11212 Filed 5–6–11; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–9303–5]

Science Advisory Board Staff Office; Notification of a Public Teleconference of the Chartered Science Advisory Board

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: The EPA Science Advisory Board (SAB) Staff Office announces a public teleconference of the chartered SAB on June 7, 2011 to conduct a quality review of a draft SAB report entitled "SAB Review of Valuing Mortality Risk Reductions for Environmental Policy."

DATES: The public teleconference will be held on June 7, 2011, from 12 p.m. to 3 p.m. (Eastern Time).

ADDRESSES: The public teleconference will be conducted by telephone only.

FOR FURTHER INFORMATION CONTACT: Any member of the public wishing to obtain general information concerning the public teleconference may contact Dr. Holly Stallworth, Designated Federal Officer (DFO), EPA Science Advisory Board via e-mail at *stallworth.holly@epa.gov,* telephone/voice mail (202) 564–2073, or fax (202) 565–2098. General information concerning the EPA Science Advisory Board can be found on the EPA Web site at *http://www.epa.gov/sab.*

SUPPLEMENTARY INFORMATION: The SAB was established pursuant to the Environmental Research, Development, and Demonstration Authorization Act (ERDAA), codified at 42 U.S.C. 4365, to provide independent scientific and technical advice to the EPA Administrator on the technical basis for Agency positions and regulations. The SAB is a Federal Advisory Committee chartered under the Federal Advisory Committee Act (FACA), 5 U.S.C., App. 2. Pursuant to FACA and EPA policy, notice is hereby given that the SAB will hold a public teleconference to conduct a quality review of a draft report entitled "SAB Review of Valuing Mortality Risk Reductions for Environmental Policy." The SAB will comply with the provisions of FACA and all appropriate SAB Staff Office procedural policies.

Background: The SAB was asked to review and provide advice to EPA on a draft White Paper, entitled "Valuing Mortality Risk Reductions for Environmental Policy: A White Paper" (December 2010). To conduct this review, the SAB Staff Office requested public nominations of experts (74 FR 32607–32608) and augmented the SAB Environmental Economics Advisory Committee. The Environmental Economics Advisory Committee Augmented for Valuing Mortality Risk Reduction held a face-to-face public meeting on January 20–21, 2011 (75 FR 80048–80049) and a public teleconference on March 14, 2011 (76 FR 11242–11243). The SAB will conduct a quality review of the Panel's draft report. Background information about this SAB advisory activity can be found on the SAB Web site at *http://yosemite.epa.gov/sab/sabproduct.nsf/fedrgstr_activites/Mortality%20Risk%20Valuation?OpenDocument.*

Availability of Meeting Materials: The agenda and other materials in support of the teleconference will be placed on the SAB Web site at *http://www.epa.gov/sab* in advance of the teleconference.

Procedures for Providing Public Input: Public comment for consideration by EPA's Federal advisory committees and panels has a different purpose from public comment provided to EPA program offices. Therefore, the process for submitting comments to a Federal advisory committee is different from the process used to submit comments to an EPA program office.

Federal advisory committees and panels, including scientific advisory committees, provide independent advice to EPA. Members of the public can submit comments for a Federal advisory committee to consider as it develops advice for EPA. Input from the public to the SAB will have the most impact if it provides specific scientific or technical information or analysis for SAB panels to consider or if it relates to the clarity or accuracy of the technical information. Members of the public wishing to provide comment should contact the Designated Federal Officer directly. *Oral Statements:* Individuals or groups requesting an oral presentation will be limited to three minutes. Those interested in being placed on the public speaker list for the June 7, 2011 teleconference should contact Dr. Stallworth at the contact information provided above no later than June 1, 2011. *Written Statements:* Written statements should be supplied to the DFO via e-mail at the contact information noted above by June 1, 2011 for the teleconference so that the information may be made available to the Panel members for their consideration. Written statements should be supplied in one of the following electronic formats: Adobe Acrobat PDF, MS Word, MS PowerPoint, or Rich Text files in IBM–PC/Windows 98/2000/XP format. It is the SAB Staff Office general policy to post written comments on the Web page for the advisory meeting or teleconference. Submitters are requested to provide an unsigned version of each document because the SAB Staff Office does not publish documents with signatures on its Web sites. Members of the public should be aware that their personal contact information, if included in any written comments, may be posted to the SAB Web site. Copyrighted material will not be posted without explicit permission of the copyright holder.

Accessibility: For information on access or services for individuals with disabilities, please contact Dr. Stallworth at (202) 564–2073 or *stallworth.holly@epa.gov.* To request accommodation of a disability, please contact Dr. Stallworth preferably at least ten days prior to the teleconference to give EPA as much time as possible to process your request.

Dated: May 3, 2011.

Anthony Maciorowski,

Deputy Director, EPA Science Advisory Staff Office.

[FR Doc. 2011–11209 Filed 5–6–11; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–9302–9]

Re-Issuance of a General Permit to the National Science Foundation for the Ocean Disposal of Man-Made Ice Piers From McMurdo Station in Antarctica; Proposed Permit

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: EPA proposes to re-issue a permit authorizing the National Science Foundation (NSF) to dispose of ice piers in ocean waters. Permit re-issuance is necessary because the current permit has expired. EPA does not propose changes to the content of the permit because ocean disposal under the terms of the previous permit will continue to meet the ocean disposal criteria.

DATES: Written comments on this proposed general permit will be accepted until June 8, 2011. All comments must be received or postmarked by midnight of June 8, 2011, or must be delivered by hand by the close of business of that date to the address specified below.

ADDRESSES: This proposed permit is identified as Docket No. EPA–HQ–OW–2011–0306. Submit your comments by one of the following methods:

Mail: Send an original and three copies of your comments and enclosures (including references) to Water Docket, U.S. Environmental Protection Agency, Mail Code: 2822–IT, 1200 Pennsylvania Avenue, NW., Washington, DC 20460, Attention Docket No. EPA–HQ–OW–2011–0306.

Hand delivery: EPA Water Docket, EPA Docket Center, EPA West Building, Room 3334, 1301 Constitution Avenue, NW., Washington, DC 20460, Docket No. EPA–HQ–OW–2011–0306. Deliveries to the docket are accepted only during their normal hours of operation: 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. For access to docket materials, call: 202/566–2426, to schedule an appointment.

E- mail: ow-docket@epa.gov; Attention Docket No. EPA–HQ–OW–2011–0306. To ensure that EPA can properly respond to comments,

commenters should cite the paragraph(s) or sections in the proposed permit to which each comment refers. Commenters should use a separate paragraph for each issue discussed, and must submit any references cited in their comments. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment. Electronic files should avoid any form of encryption and should be free of any defects or viruses.

FOR FURTHER INFORMATION CONTACT: Jonathan Amson, Senior Marine Scientist, Marine Pollution Control Branch, Oceans and Coastal Protection Division (4504T), U.S. Environmental Protection Agency, 1200 Pennsylvania Avenue, NW., Washington, DC 20460; telephone: 202/566–1276.

SUPPLEMENTARY INFORMATION: On February 14, 2003, EPA issued a general permit to the National Science Foundation (NSF) for ocean disposal of man-made ice piers from its base at McMurdo Station in Antarctica. This ocean dumping permit had a term of seven years. It remains in effect under the Administrative Procedure Act, 5 U.S.C. 558(c), after its February 18, 2010 expiration because NSF applied for re-issuance prior to expiration. The purpose of today's proposed general permit is to re-issue the 2003 permit for another seven-year period. The re-issued permit will allow the NSF to ocean dispose the ice pier currently in use at McMurdo Station, which is at the end of its service life.

EPA proposes to re-issue the general permit under Sections 102(a) and 104(c) of the Marine Protection, Research, and Sanctuaries Act (MPRSA) to authorize the NSF to dispose of man-made ice piers in ocean waters from McMurdo Station in Antarctica. The NSF is the entity of the United States Government responsible for oversight of the United States Antarctic Program. The NSF currently operates three major bases in Antarctica: McMurdo Station on Ross Island, adjacent to McMurdo Sound; Palmer Station, near the western terminus of the Antarctic Peninsula; and Amundsen-Scott Station, at the geographic South Pole. McMurdo Station is the largest of the three bases, and serves as the primary logistics base for Antarctica. The great majority of personnel and supplies destined for the three stations are unloaded at, and pass through, McMurdo Station. To unload supplies, ships dock at an ice pier. Man-made ice piers have a normal life span of three to five years; the current ice pier, constructed in 1999, is over ten years old, and is effectively at the end of its service life.

When an ice pier is at the end of its effective life, all transportable equipment, materials, and debris are removed; the pier is cast loose from its moorings at the base. It is then towed out to McMurdo Sound for disposal, where it disintegrates naturally. Re-issuance of this general permit is necessary because the pier must be towed out to sea for disposal at the end of its effective life. This proposed general permit is intended to protect the marine environment by setting forth specific permit terms and conditions including operating conditions that occur over the life of the pier. It also describes required clean-up actions that the NSF must comply with before the disposal of any ice pier can take place.

A. Background on McMurdo Station Ice Pier

For background information on the McMurdo Station ice pier, the reader is referred to the **Federal Register** notice of January 7, 2003 (68 FR 775–780), which is hereby incorporated by reference into this notice. None of the stipulated facts of Section A ("Background on McMurdo Station Ice Pier") of the January 7, 2003, notice have changed since its issuance on that date. The materials to be dumped (other than the ice in the pier itself, which melts naturally) include materials used in construction of the ice pier that cannot be removed prior to disposal. As explained in the January 7, 2003, notice, construction of an ice pier at McMurdo Station involves the following types and approximate quantities of materials that are normally used: (a) 6,300 m (21,000 ft) of one-inch steel cable; (b) 200 m (650 ft) of two-inch steel pipe; (c) three or four chemically-untreated wooden utility poles approximately one-foot in diameter, (d) several steel bollards; and (e) 4,200 cubic meters (5,000 cubic yards) of gravel, 2 cm or smaller in size. When the pier has deteriorated to the point that it is no longer capable of being used during the next operating season, the wooden poles are cut off just above the surface of the ice, the steel bollards are blasted loose and removed, the gravel is scraped off and stored for use during the next operating season, all transportable equipment, materials, and debris are removed, and the pier is separated from its attachment at McMurdo Station at the end of the austral summer. It is then towed by a ship into McMurdo Sound past the northern end of the open channel in the ice, as close to the Ross Sea currents as possible. The pier is cast loose in a direction to allow it to flow with the Ross Sea currents, away from the open channel in the ice. The pier will then float amidst the ice pack, where it mixes with the annual Antarctic sea ice, and eventually disintegrates.

B. Statutory and Regulatory Background

1. Obligations Under United States Law

Section 102(a) of the MPRSA, 33 U.S.C. 1412(a), requires that agencies or instrumentalities of the United States obtain a permit to transport any material from any location for the purpose of dumping into ocean waters. MPRSA Section 104(c), 33 U.S.C. 1414(c), and EPA regulations at 40 CFR 220.3(a) authorize the issuance of a general permit under the MPRSA for the dumping of materials which have a minimal adverse environmental impact, and are generally disposed of in small quantities. The proposed towing of ice piers by the NSF from McMurdo Station for disposal at sea constitutes transportation of material for the purpose of dumping in ocean waters; thus, it is subject to the requirements of the MPRSA. Ocean disposal of the materials incorporated into the ice pier will have a minimal adverse environmental impact, and represents comparatively small quantities of non-recoverable, non-ice matter.

The NSF has completed a United States Antarctic Program (USAP) Environmental Impact Statement (June 1980), a USAP Final Supplemental Environmental Impact Statement (October 1991), and an Initial Environmental Evaluation (May 1992). More recently, the NSF has issued two Records of Environmental Review: Installation of Freeze Cells in Ice Piers (1998), and Use of Freeze Cells in Ice Piers to Repair Cracks (2000). All these documents address various aspects of the construction, operation, and disposal of ice piers at McMurdo Station in Antarctica, and are available for review at the Office of Polar Programs of the NSF, 4201 Wilson Boulevard, Arlington, VA 22230. (For further information, contact Polly Penhale, at 703/292–7420). None of these documents identified any potential environmental impacts from the disposal of ice piers, other than the minor navigational hazard equivalent to that posed by an ice floe or a small iceberg. The Agency considered the analyses contained in the five documents in developing this proposed re-issuance of the general permit for the NSF.

2. Obligations Under International Law

The Antarctic Science, Tourism, and Conservation Act of 1996 amended the Antarctic Conservation Act of 1978. This law is designed to implement the provisions of the Protocol on Environmental Protection to the Antarctic Treaty ("the Protocol"). The United States Senate ratified the Protocol on April 17, 1997, and it entered into force on January 18, 1998. The Protocol builds on the Antarctic Treaty to extend its effectiveness as a mechanism for ensuring protection of the Antarctic environment. It designates Antarctica as a natural reserve, devoted to peace and science, and sets forth basic principles as well as detailed mandatory rules that are applicable to human activities in Antarctica. It prohibits all activities relating to mineral resources on the continent, except for scientific research. It commits signatories (known as Parties) to the Protocol to complete environmental impact assessment procedures for proposed activities, both governmental and private. Among other things, it requires Parties to protect Antarctic flora and fauna, and it imposes strict limitations on disposal of wastes on the continent, as well as discharges of pollutants in Antarctic waters.

Several sets of regulations exist that assist in the implementation of the Protocol. These include: (a) NSF regulations regarding environmental impact assessment of proposed Foundation actions in Antarctica (45 CFR Part 641), (b) NSF waste regulations for Antarctica (45 CFR Part 671), and (c) EPA regulations regarding environmental impact assessment of non-governmental activities in Antarctica (40 CFR Part 8).

EPA's proposal to re-issue a general permit under the MPRSA does not conflict with obligations under the Protocol and any implementing legislation. EPA has coordinated with other responsible authorities, as appropriate, in EPA's consideration of the issuance of a general permit under the MPRSA.

C. Potential Effects of Ice Pier Disposal

EPA's findings regarding (a) the fate of materials disposed in the ocean, (b) the potential effects of ice pier disposal on organisms in the polar marine environment, such as cetaceans (whales), pinnipeds (seals), avian species, and endangered or threatened species, and (c) environmental concerns associated with any operational discharges, leaks, or spills that may have contaminated the surface of the ice pier over the period of its existence are explained in Section C of the January 7, 2003, notice, and have not changed, with one exception. That exception is the updated spill prevention, control, and countermeasures (SPCC) plan, which is described below.

EPA notes that the NSF has a SPCC plan for all the stations and bases under NSF jurisdiction in Antarctica. That plan, initially formulated in 1994, has been updated by NSF, and is titled: SPCC Plan for McMurdo Station, McMurdo Sound, Antarctica; the final document is dated January 7, 2010. The SPCC plan includes a section addressing fuel storage and transfer systems for the ice pier at McMurdo Station. EPA adopts the findings from the January 7, 2010, notice in its proposed permit today.

D. Discussion

This new general permit that EPA proposes to re-issue to NSF and its agents for the ocean dumping of man-made ice piers from NSF's McMurdo Station, Antarctica, is subject to specific conditions. This proposed general permit applies only to the ocean dumping of man-made ice piers from the NSF base at McMurdo Station, Antarctica. Agents of the NSF are included in the permit because transportation for the purpose of dumping an ice pier may be by vessels which are not under the direct ownership or operational control of the NSF. Section 104(a) of the MPRSA provides that permits shall be issued for a period not to exceed seven years (33 U.S.C. 1414(a)); thus, the term of this proposed permit is limited to seven years from the date of issuance.

With the institution of new protective measures, such as longer length hoses for unloading petroleum products from the annual supply tanker, and new precautions taken in the handling and return to bases outside of Antarctica of used and contaminated chemicals, solvents, and hazardous materials, the chance of a spill or discharge of these materials is low. There is considerable vehicular traffic on the ice pier during the austral summer season, and the possibility of leaks or discharges from these vehicles cannot be totally avoided. However, the NSF has informed EPA that vehicles are parked on the pier for only brief periods of time, ranging from a few minutes to less than an hour, and that no vehicles are ever parked on the pier overnight. Additionally, such small discharges are typically contained within the temporary gravel cover, which is removed prior to ocean disposal.

The proposed general permit establishes several specific conditions that shall be met during the life of, and prior to the dumping of, the ice pier. In addition, it requires the NSF to report by June 30 of every year to the Director of the Oceans and Coastal Protection Division, in EPA's Office of Water, on any spills, discharges, or clean-up procedures on the ice pier, and on any dumping of ice piers from McMurdo Station that are conducted under this general permit.

This general permit requires that the NSF have an SPCC plan in place for the ice pier. This plan must address (specified in Item 1 in the permit):

(a) The unloading of petroleum products from supply tankers to the storage tanks at McMurdo Station;

(b) The unloading of drummed chemicals, petroleum products, and material from cargo freighters to supply depots at McMurdo Station; and

(c) The loading of materials to freighters that are destined to be returned to bases outside of Antarctica.

The proposed permit requires that the SPCC plan include methods to minimize the accidental release or discharge of any products to the ice pier. In addition, the proposed general permit requires that the following clean-up and reporting procedures must be followed by NSF in the event of a spill or discharge on the pier (specified in Item 2 in the permit):

(a) All spills or discharges must be cleaned up within two hours of the spill or discharge, or as soon as possible thereafter;

(b) If a spill or discharge occurs, clean-up procedures must be completed to a level below any visible evidence of the spill or discharge;

(c) As part of normal permit monitoring requirements, an official record of the following information shall be kept by NSF (specified in Item 3 in the permit):

(1) The date and time of all spills or discharges, the location of the spill or discharge, the approximate volume of the spill or discharge, the clean-up procedures employed, and the results of those procedures;

(2) The number of wooden poles remaining in the pier at the time of release from McMurdo Station, and their approximate length;

(3) The approximate length of the steel cables remaining in the pier at the time of its release;

(4) Any other non-ice substances remaining on the pier at the time of its release; and

(5) The date of detachment of the pier from McMurdo Station, and the geographic coordinates (latitude and longitude) of the point of final release of

the pier in McMurdo Sound or the Antarctic Sea.

(d) A copy of this record shall be submitted to the Director of the Oceans and Coastal Protection Division, in the Office of Water, at EPA Headquarters, by June 30 of every year as part of the annual reporting requirements.

The conditions specified in the proposed permit are intended to protect the Antarctic environment against release of contaminants from the McMurdo Station ice pier following its ocean dumping and subsequent disintegration and melting.

Furthermore, the NSF is directed, as a condition of this permit, to utilize a methodology to track any ice piers released from McMurdo Station for a period of one year from the date of release of the pier (specified in Item 5(c) of the permit). Such methodologies may include the use of satellite-tracked pingers placed on the ice pier, or any other methodology that will allow data to be collected on the course, speed, and location of the released ice pier. The results of these tracking efforts shall be included in the reports that NSF is required to submit to EPA. The period of one year was chosen by EPA for several reasons. First, batteries for pinger-tracking operations beyond a period of one year become considerably heavier and bulkier (and a greater source of pollution to the marine environment when the ice pier eventually disintegrates and melts); and second, one year's tracking measurements should provide substantial evidence about the geographic track of ice piers during the disintegration process. The NSF shall submit tracking reports to EPA for all releases of ice piers from McMurdo Station under this permit. If tracking results demonstrate that all ice piers released have generally followed the same geographic path and time of disintegration for the one year following release, EPA will consider whether further tracking efforts and reports shall be required from NSF in any future issuances of this permit.

EPA received the tracking records from NSF of the last release of an ice pier from McMurdo Station. The pier was released on February 14, 1999, and travelled in a generally northern direction into the Southern Ocean; it was tracked until the pinger signal was lost on December 7, 1999. However, the ice pier only showed movement from the time of its release until May 1, 1999; from that time until December 7th, there was no further travel of the pier, and it is assumed it was frozen into the Antarctic ice pack. The following table provides information on the path of the ice pier from February 14 to May 1, 1999:

Date	Latitude	Longitude
February 14, 1999	77.75° S.	166.37° E.
February 28, 1999	76.92° S.	162.90° E.
March 15, 1999	75.43° S.	167.35° E.
March 30, 1999	73.48° S.	170.91° E.
April 10, 1999	70.77° S.	169.46° E.
April 20, 1999	70.53° S.	168.06° E.
May 1, 1999	70.38° S.	167.22° E.

Using a great circle distance calculator, it can be determined that, from the time of its release until the pier was frozen into the ice pack, the ice pier travelled a total distance of 526 statute miles, or 457 nautical miles.

Considering that any contaminants remaining on the surface of the pier are expected to be extremely small, and that the area over which the disintegration and melting of the piers is immense (and probably incalculable), the potential for damage to the environment from the ocean dumping of ice piers from McMurdo Station, in Antarctica, is minimal. In addition, the possibility of entanglement of any large organisms in suspended loops of cable from the melting piers has been determined by EPA to be very minimal; further discussion of this issue can be found in "C. Potential Effects of Ice Pier Disposal", in the January 7, 2003 notice.

Statutory and Executive Order Reviews

A. Paperwork Reduction Act

The Paperwork Reduction Act, 44 U.S.C. 3501 et seq., is intended to minimize the reporting and record-keeping burden on the regulated community, as well as to minimize the cost of Federal information collection and dissemination. In general, the Act requires that information requests and record-keeping requirements affecting ten or more non-Federal respondents be approved by the Office of Management and Budget. Since this proposed general permit affects only a single Federal agency's record-keeping and reporting requirements, it is not subject to the requirements of the Paperwork Reduction Act.

B. Endangered Species Act

The Endangered Species Act (ESA) imposes duties on Federal agencies regarding endangered species of fish, wildlife, or plants and habitat of such species that have been designated as critical. Section 7(a)(2) of the ESA and its implementing regulations (50 CFR Part 402) require EPA to ensure, in consultation with the Secretary of the Interior or Commerce, that any action authorized, funded, or carried out by EPA in the United States or upon the high seas, is not likely to jeopardize the continued existence of any endangered or threatened species, or adversely affect their critical habitat.

In compliance with Section 7 of the ESA, an endangered species list for the affected area of ocean dumping of ice piers from the NSF facility at McMurdo Station in Antarctica was requested by EPA and received from both the U. S. Fish and Wildlife Service (USF&WS) of the Department of the Interior, and the National Marine Fisheries Service (NMFS) of the U.S. Department of Commerce. No endangered, threatened, or candidate species are reported to potentially occur in the affected area.

EPA has discussed this matter with both the USF&WS and the NMFS pursuant to Section 7 of the ESA, and both agencies have agreed that the ocean dumping of ice piers by the NSF or its agents from McMurdo Station in Antarctica will have no effect on endangered or threatened species. EPA will consider any comments offered by either the USF&WS or the NMFS on this issue before promulgating a final general permit on the ocean dumping of ice piers.

Dated: May 3, 2011.

Paul Cough,

Director, Oceans and Coastal Protection Division.

Paul Cough,

Director, Oceans and Coastal Protection Division.

EPA proposes to re-issue a general permit for the NSF as follows:

Disposal of Ice Piers From McMurdo Station, Antarctica

The U.S. National Science Foundation and its agents are hereby granted a general permit under Sections 102(a) and 104(c) of the Marine Protection, Research, and Sanctuaries Act, 33 U.S.C. 1412(a) and 1414(c), to transport ice piers from McMurdo Station, Antarctica, for the purpose of ocean dumping, subject to the following conditions:

(1) The NSF shall have a spill prevention, control, and countermeasures (SPCC) plan in place, for the McMurdo Station ice pier. The SPCC plan shall address procedures for loading and unloading the following materials, and shall include methods to minimize the accidental release or

discharge of any of these materials to the ice pier:

(a) Petroleum products unloaded from supply tankers to storage tanks at McMurdo Station;

(b) Drummed chemicals, petroleum products, and all materials unloaded from cargo freighters to supply depots at McMurdo Station; and

(c) All materials loaded to freighters destined to be returned to bases outside Antarctica.

(2) If a spill or discharge occurs on an ice pier, clean-up procedures must be completed by NSF or its contractors to a level below any visible evidence of the spill or discharge. All spills or discharges on an ice pier must be cleaned up within two hours of the spill or discharge, unless circumstances prevent cleanup within that time frame. In that event, the spill or discharge shall be cleaned up as soon as possible thereafter.

(3) As part of normal monitoring requirements, a record of the following information shall be kept by NSF:

(a) The date and time of all spills or discharges, the location of the spill or discharge, a description of the material that was spilled or discharged, the approximate volume of the spill or discharge, clean-up procedures employed, and the results of those procedures;

(b) The number of wooden poles remaining in the pier at the time of its release from McMurdo Station, and their approximate length;

(c) The approximate length of the steel cables remaining in the pier at the time of its release from McMurdo Station;

(d) Any other non-ice materials remaining on the pier at the time of its release from McMurdo Station; and

(e) The date of detachment of the pier from McMurdo Station, and the geographic coordinates (latitude and longitude) of the point of final release of the pier in McMurdo Sound or the Antarctic Sea.

(4) The non-embedded ends of all wooden utility poles or bollards shall be cut off from the ice pier prior to disposal, and shall not be disposed of in the ocean.

(5) Prior to the ocean dumping of any ice piers, the NSF shall take the following actions:

(a) Other than the matter physically embedded in the ice pier (such as the ends of wooden light poles frozen in the pier, and the strengthening steel cables), all other objects (including the non-embedded portions of the wooden poles used for lighting, power, or telephone connections, and any removable cables, equipment debris, or objects of anthropogenic origin), shall be removed from the ice pier prior to dumping;

(b) The gravel non-slip surface of the ice pier shall be removed to the maximum extent possible, and shall be stored on the mainland for subsequent use during the next operating season; and

(c) A methodology to track any ice piers released from McMurdo Station shall be established and utilized for a period of one year from the date of release of the ice pier. The results of these tracking efforts shall be included in the annual reports that the NSF is required to submit to the Agency.

(6) The NSF shall submit a report by June 30 of every year to the Director, Oceans and Coastal Protection Division, Office of Water, 1200 Pennsylvania Avenue, N.W., Washington, DC 20460, on:

(a) Any spills, discharges, or clean-up procedures on the ice pier at McMurdo Station;

(b) Any ocean dumping of ice piers from McMurdo Station; and

(c) Any tracking efforts of ice piers released from McMurdo Station under this general permit, for the year preceding the date of the annual report.

(7) For the purpose of this permit, the term "ice pier(s)" means those man-made ice structures containing embedded steel cable, wooden pole ends, and any remaining gravel frozen into the surface of the pier, that are constructed at McMurdo Station, Antarctica, for the purpose of off-loading the annual provisions of fuel, supplies, and materiel for use by NSF activities in Antarctica, as well as for the purpose of loading the previous year's accumulation of wastes, which can be returned to the United States for recycling and disposal.

(8) This permit shall be valid until (month)(day), 2018.

[FR Doc. 2011–11211 Filed 5–6–11; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–9303–3]

Notice of a Regional Project Waiver of Section 1605 (Buy American) of the American Recovery and Reinvestment Act of 2009 (ARRA) to the City of South Burlington, VT

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: The EPA is hereby granting a waiver of the Buy American requirements of ARRA Section 1605 under the authority of Section 1605(b)(1) [inconsistent with the public interest] to the City of South Burlington, Vermont ("City") for the installation of two specific turbo aeration blower units for the City's Airport Parkway Wastewater Treatment Plant Upgrade project. This is a project specific waiver and only applies to the use of the specified products for the ARRA project under construction. Any other ARRA recipient that wishes to use the same products must apply for a separate waiver based on project specific circumstances. The City was provided written representations by the manufacturer (K Turbo USA) during 2009 and early 2010 that the turbo aeration blower units being supplied would be substantially transformed in the United States and would be in compliance with the Buy American provisions of ARRA. However, as a result of a recent on-going criminal investigation, the written representations provided by the manufacturer that the specified aeration blowers units had undergone substantial transformation in the United States have been questioned. Based on the information provided by the City, EPA agrees with the City that, if the K–Turbo units in question are determined to be non-American made, requiring the installation of domestically manufactured turbo aeration blower units will extend the time frame of the project by approximately five months due to the redesign, procurement, submittal delivery, submittal review, fabrication, delivery, and replacement of the aeration blower installation at the construction site. This delay is inconsistent with the public interest, and a waiver of the Buy American provisions in these circumstances is justified. The Regional Administrator is making this determination based on the review and recommendations of the Municipal Assistance Unit. The Assistant Administrator of the Office of Administration and Resources Management has concurred on this decision to make an exception to the requirements of Section 1605(a) of ARRA. This action allows the installation of the two specified turbo aeration blower units that have already been delivered to the construction site as noted in the City's March 31, 2011 request.

DATES: *Effective Date:* May 9, 2011.

FOR FURTHER INFORMATION CONTACT: Katie Connors, Environmental Engineer, (617) 918–1658, or, David Chin, Environmental Engineer, (617) 918–1764, Municipal Assistance Unit (CMU), Office of Ecosystem Protection (OEP),

U.S. EPA, 5 Post Office Square, Suite 100, Boston, MA 02109–3912.

SUPPLEMENTARY INFORMATION: In accordance with ARRA Section 1605(c), the EPA hereby provides notice that it is granting a project specific waiver of the requirements of Section 1605(a) of Public Law 111–5, Buy American requirements, to the City of South Burlington (City), Vermont for the installation of two specified aeration blower units as part of its Airport Parkway Wastewater Treatment Plant Upgrade project. Based on the information provided by the City, EPA has determined that it is inconsistent with the public interest for the City to further delay the project to pursue the purchase and installation of domestic manufactured turbo aeration blower units.

Section 1605 of the ARRA requires that none of the appropriated funds may be used for the construction, alteration, maintenance, or repair of a public building or a public works project unless all of the iron, steel, and manufactured goods used in the project is produced in the United States, or unless a waiver is provided to the recipient by the head of the appropriate agency, here the EPA. A waiver may be provided under Section 1605(b) if EPA determines that (1) applying these requirements would be inconsistent with the public interest; (2) iron, steel, and the relevant manufactured goods are not produced in the United States in sufficient and reasonably available quantities and of a satisfactory quality; or (3) inclusion of iron, steel, and the relevant manufactured goods produced in the United States will increase the cost of the overall project by more than 25 percent.

Consistent with the direction of OMB's regulation at 2 CFR 176.120, EPA will generally consider a waiver request with respect to components that were specified in the bid solicitation or in a general/primary construction contract or those made after obligating ARRA funds for a project to be a "late" request. However, in this case EPA has determined that the City's request, though made after the date the contract was signed, can be evaluated as timely because of the extenuating circumstances surrounding this on-going project.

The City was provided written representations prior to delivery by the manufacturer that the specified turbo aeration blower units would be substantially transformed in the United States. During the spring of 2010, the City's general contractor and design engineer were actively engaged in the shop drawing submittal and review process. The general contractor submitted technical information to the design engineer for review and approval, along with ARRA certification required for contract specifications. The shop drawing process for the KTurbo aeration blower units was completed at that time and KTurbo provided additional certification regarding substantial transformation and compliance with the ARRA requirements, specifically the Buy American provision. However, as a result of a recent on-going criminal investigation, the written representations provided by the manufacturer that these specific turbo aeration blowers units had undergone substantial transformation in the United States have been questioned. The City of South Burlington could not reasonably have foreseen the need for a waiver from the Buy American provisions of ARRA until it was fully informed of the extenuating circumstances surrounding the on-going criminal investigation involving KTurbo. Accordingly, EPA will evaluate the request as if it were timely.

As of March 31, 2011, the City's Airport Parkway Wastewater Treatment Facility Upgrade construction project is approximately two thirds completed. One of the old existing three aeration blower units has already been removed, and one of the new turbo aeration blower units has already been installed and is in operation serving the plant's main biological treatment process. This aeration blower unit is identical to the two specified aeration blower units involved in this waiver request that have not yet been installed. The General Contractor's plans are to install these two specified turbo aeration blower units during April of 2011 to stay on its critical path to complete construction.

Not allowing the installation of these two specified turbo aeration blower units that have been delivered to the site would cause a significant time delay to the project. The City would need to completely redesign, procure, and have domestic manufactured turbo aeration blower units delivered to the site. In addition, the City would need to make some necessary building and room changes (*e.g.* associated piping and electrical revisions) to accommodate any replacement units, install, and properly start-up the new equipment. According to the City, it is estimated that this approach could delay the construction completion date by up to five months.

In addition to imposing a lengthy time delay to the project, not installing the two other specified aeration blower units would result in an unbalanced air blower system comprised of one high efficiency turbo blower with specific performance characteristics, and two conventional centrifugal blowers with different performance characteristics. Operation and maintenance of such an unbalanced system is not common and is not recommended since it would result in additional operating costs due to additional plant training, additional and non-matching spare parts, and possibly additional maintenance and repair, resulting in risk to water quality.

The Municipal Assistance Unit (CMU) has reviewed this waiver request and has determined that the documentation provided by the City has established a proper basis to specify that using the domestic manufactured good, if in fact the goods provided by K–Turbo are determined to be non-domestic, would be inconsistent with the public interest. The information provided is sufficient to meet the following criteria listed under Section 1605(b)(1) of the ARRA and in the April 28, 2009 Memorandum: Applying these requirements would be inconsistent with the public interest.

The March 31, 2009 Delegation of Authority Memorandum provided Regional Administrators with the temporary authority to issue exceptions to Section 1605 of the ARRA within the geographic boundaries of their respective regions and with respect to requests by individual grant recipients.

Having established both a proper basis to specify the particular good required for this project and that using a domestically available alternative manufactured good, if in fact the goods provided by K–Turbo are determined to be non-domestic, would be inconsistent with the public interest, the City of South Burlington, Vermont is hereby granted a waiver from the Buy American requirements of Section 1605(a) of Public Law 111–5. This waiver permits the use of ARRA funds for the installation of two specified turbo aeration blower units documented in the City's waiver request submittal dated March 31, 2011. This supplementary information constitutes the detailed written justification required by Section 1605(c) for waivers based on a finding under subsection (b).

Authority: Public Law 111–5, section 1605.

Dated: April 28, 2011.

Ira W. Leighton,

Acting Regional Administrator, EPA Region 1—New England.

[FR Doc. 2011–11216 Filed 5–6–11; 8:45 am]

BILLING CODE 6560–50–P

FARM CREDIT ADMINISTRATION

Farm Credit Administration Board; Sunshine Act; Regular Meeting

AGENCY: Farm Credit Administration.

SUMMARY: Notice is hereby given, pursuant to the Government in the Sunshine Act (5 U.S.C. 552b(e)(3)), of the regular meeting of the Farm Credit Administration Board (Board).

DATE AND TIME: The regular meeting of the Board will be held at the offices of the Farm Credit Administration in McLean, Virginia, on May 12, 2011, from 9 a.m. until such time as the Board concludes its business.

FOR FURTHER INFORMATION CONTACT: Dale L. Aultman, Secretary to the Farm Credit Administration Board, (703) 883–4009, TTY (703) 883–4056.

ADDRESSES: Farm Credit Administration, 1501 Farm Credit Drive, McLean, Virginia 22102–5090.

SUPPLEMENTARY INFORMATION: Parts of this meeting of the Board will be open to the public (limited space available), and parts will be closed to the public. In order to increase the accessibility to Board meetings, persons requiring assistance should make arrangements in advance. The matters to be considered at the meeting are:

Open Session

A. Approval of Minutes

- April 14, 2011

B. New Business

- Lending and Leasing Limits and Risk Management—Final Rule
- Loan Policies and Operations; Loan Purchases from FDIC—Final Rule

C. Report

- Office of Management Services Quarterly Report

Closed Session*

Reports

- Office of Secondary Mortgage Oversight Quarterly Report

Dated: May 5, 2011.

Dale L. Aultman,

Secretary, Farm Credit Administration Board.

[FR Doc. 2011–11387 Filed 5–5–11; 4:15 pm]

BILLING CODE 6705–01–P

* Session Closed-Exempt pursuant to 5 U.S.C. 552b(c)(8) and (9).

FEDERAL COMMUNICATIONS COMMISSION

Information Collection Being Reviewed by the Federal Communications Commission

AGENCY: Federal Communications Commission.

ACTION: Notice and request for comments.

SUMMARY: The Federal Communications Commission (FCC), as part of its continuing effort to reduce paperwork burdens, invites the general public and other Federal agencies to take this opportunity to comment on the following information collection, as required by the Paperwork Reduction Act (PRA) of 1995, 44 U.S.C. 3501–3520. Comments are requested concerning (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimate; (c) ways to enhance the quality, utility, and clarity of the information collected; (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology; and (e) ways to further reduce the information collection burden on small business concerns with fewer than 25 employees. The FCC may not conduct or sponsor a collection of information unless it displays a currently valid control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the PRA that does not display a valid Office of Management and Budget (OMB) control number.

DATES: Written PRA comments should be submitted on or before July 8, 2011. If you anticipate that you will be submitting comments, but find it difficult to do so within the period of time allowed by this notice, you should advise the contact listed below as soon as possible.

ADDRESSES: Direct all PRA comments to Cathy Williams, FCC, via email PRA@fcc.gov and to *Cathy.Williams@fcc.gov.*

FOR FURTHER INFORMATION CONTACT: For additional information about the information collection, contact Cathy Williams at (202) 418–2918.

SUPPLEMENTARY INFORMATION:

OMB Control Number: 3060–1146.

Title: Implementation of the Twenty-first Century Communications and Video Accessibility Act of 2010, Section 105, Relay Services for Deaf-Blind Individuals, CG Docket No. 10–210.

Form Number: N/A.

Type of Review: Revision of a currently approved collection.

Respondents: Individuals or households; businesses or other for-profit entities; not-for-profit institutions; Federal government; State, local or tribal governments.

Number of Respondents and Responses: 106 respondents; 406 responses.

Estimated Time per Response: 24 to 120 hours.

Frequency of Response: Annual, on occasion, one-time, monthly, and semi-annually reporting requirements; Recordkeeping requirement; Third party disclosure requirement.

Obligation To Respond: Required to obtain or retain benefit. The statutory authority for the information collections is contained in 47 U.S.C. 154, 254(k); sections 403(b)(2)(B), (c), Public Law 104–104, 110 Stat. 56. Interpret or apply 47 U.S.C. 201, 218, 222, 225, 226, 228, 254(k), and 620.

Total Annual Burden: 21,412 hours.

Total Annual Cost: None.

Nature and Extent of Confidentiality: Confidentiality is an issue to the extent that individuals and households provide personally identifiable information, which is covered under the FCC's system of records notice (SORN), FCC/CGB–1, "Informal Complaints and Inquiries." As required by the Privacy Act, 5 U.S.C. 552a, the Commission also published a SORN, FCC/CGB–1 "Informal Complaints and Inquiries," in the **Federal Register** on December 15, 2009 (74 FR 66356) which became effective on January 25, 2010. Also, the Commission is in the process of preparing the new SORN and PIA titled CGB–3, "National Deaf-Blind Equipment Distribution Program," to cover the PII collected related thereto, as required by OMB's Memorandum M–03–22 (September 26, 2003) and by the Privacy Act, 5 U.S.C. 552a.

Privacy Impact Assessment: Yes. The Privacy Impact Assessment (PIA) was completed on June 28, 2007. It may be reviewed at: *http://www.fcc.gov/omd/privacyact/Privacy_Impact_Assessment.html.* The Commission is in the process of updating the PIA to incorporate various revisions made to the SORN and is in the process of preparing a new SORN to cover the PII collected related thereto, as stated above.

Needs and Uses: On April 6, 2011, in document FCC 11–56, the Commission released a *Report and Order* adopting final rules requiring the following:

(a) State EDPs, other public programs, and private entities may submit applications for NDBEDP certification to the Commission. For each state, the Commission will certify a single program as the sole authorized entity to participate in the NDBEDP and receive reimbursement from the TRS Fund. The Commission will determine whether to grant certification based on the ability of a program to meet the following qualifications, either directly or in coordination with other programs or entities, as evidenced in the application and any supplemental materials, including letters of recommendation:

- Expertise in the field of deaf-blindness, including familiarity with the culture and etiquette of people who are deaf-blind, to ensure that equipment distribution and the provision of related services occurs in a manner that is relevant and useful to consumers who are deaf-blind;
- The ability to communicate effectively with people who are deaf-blind (for training and other purposes), by among other things, using sign language, providing materials in Braille, ensuring that information made available online is accessible, and using other assistive technologies and methods to achieve effective communication;
- Staffing and facilities sufficient to administer the program, including the ability to distribute equipment and provide related services to eligible individuals throughout the state, including those in remote areas;
- Experience with the distribution of specialized CPE, especially to people who are deaf-blind;
- Experience in how to train users on how to use the equipment and how to set up the equipment for its effective use; and
- Familiarity with the telecommunications, Internet access, and advanced communications services that will be used with the distributed equipment.

(b) Each program certified under the NDBEDP must submit the following data electronically to the Commission, as instructed by the NDBEDP Administrator, every six months, commencing with the start of the pilot program:

- For each piece of equipment distributed, the identity of and contact information, including street and e-mail addresses, and phone number, for the individual receiving that equipment;
- For each piece of equipment distributed, the identity of and contact information, including street and e-mail addresses, and phone number, for the individual attesting to the disability of the individual who is deaf-blind;
- For each piece of equipment distributed, its name, serial number, brand, function, and cost, the type of communications service with which it is used, and the type of relay service it can access;
- For each piece of equipment distributed, the amount of time, following any assessment conducted, that the requesting individual waited to receive that equipment;
- The cost, time and any other resources allocated to assessing an individual's equipment needs;
- The cost, time and any other resources allocated to installing equipment and training deaf-blind individuals on using equipment;
- The cost, time and any other resources allocated to maintain, repair, cover under warranty, and refurbish equipment;
- The cost, time and any other resources allocated to outreach activities related to the NDBEDP, and the type of outreach efforts undertaken;
- The cost, time and any other resources allocated to upgrading the distributed equipment, along with the nature of such upgrades;
- To the extent that the program has denied equipment requests made by their deaf-blind residents, a summary of the number and types of equipment requests denied and reasons for such denials;
- To the extent that the program has received complaints related to the program, a summary of the number and types of such complaints and their resolution; and
- The number of qualified applicants on waiting lists to receive equipment.

(c) Each program certified under the NDBEDP must retain all records associated with the distribution of equipment and provision of related services under the NDBEDP for two years following the termination of the pilot program.

(d) Each program certified under the NDBEDP must obtain verification that NDBEDP applicants meet the definition of an individual who is deaf-blind.

(e) Each program certified under the NDBEDP must obtain verification that NDBEDP applicants meet the income eligibility requirements.

(f) Programs certified under the NDBEDP shall be reimbursed for the cost of equipment that has been distributed to eligible individuals and authorized related services, up to the state's funding allotment under this program. Within 30 days after the end of each six-month period of the Fund Year, each program certified under the NDBEDP pilot must submit documentation that supports its claim for reimbursement of the reasonable costs of the following:

- Equipment and related expenses, including maintenance, repairs, warranties, returns, refurbishing, upgrading, and replacing equipment distributed to consumers;
- Individual needs assessments;
- Installation of equipment and individualized consumer training;
- Maintenance of an inventory of equipment that can be loaned to the consumer during periods of equipment repair;
- Outreach efforts to inform state residents about the NDBEDP; and administration of the program, but not to exceed 15 percent of the total reimbursable costs for the distribution of equipment and related services permitted under the NDBEDP.

Federal Communications Commission.

Bulah P. Wheeler,

Deputy Manager.

[FR Doc. 2011–10225 Filed 5–6–11; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL RESERVE SYSTEM

Change in Bank Control Notices; Acquisitions of Shares of a Bank or Bank Holding Company

The notificants listed below have applied under the Change in Bank Control Act (12 U.S.C. 1817(j)) and § 225.41 of the Board's Regulation Y (12 CFR 225.41) to acquire shares of a bank or bank holding company. The factors that are considered in acting on the notices are set forth in paragraph 7 of the Act (12 U.S.C. 1817(j)(7)).

The notices are available for immediate inspection at the Federal Reserve Bank indicated. The notices also will be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing to the Reserve Bank indicated for that notice or to the offices of the Board of Governors. Comments must be received not later than May 24, 2011.

A. *Federal Reserve Bank of Kansas City* (Dennis Denney, Assistant Vice President) 1 Memorial Drive, Kansas City, Missouri 64198–0001:

1. *Stanley D. Ostmeyer,* Quinter, Kansas; as trustee of State Bank Employee Stock Ownership Plan, to acquire control of Prairie State Bancshares, Inc., and thereby indirectly acquire control of State Bank, all in Hoxie, Kansas.

Board of Governors of the Federal Reserve System, May 4, 2011.

Robert deV. Frierson,

Deputy Secretary of the Board.

[FR Doc. 2011–11203 Filed 5–6–11; 8:45 am]

BILLING CODE P

FEDERAL RESERVE SYSTEM

Notice of Proposals To Engage in Permissible Nonbanking Activities or to Acquire Companies That Are Engaged in Permissible Nonbanking Activities

The companies listed in this notice have given notice under section 4 of the Bank Holding Company Act (12 U.S.C. 1843) (BHC Act) and Regulation Y, (12 CFR Part 225) to engage *de novo,* or to acquire or control voting securities or assets of a company, including the companies listed below, that engages either directly or through a subsidiary or other company, in a nonbanking activity that is listed in 225.28 of Regulation Y (12 CFR 225.28) or that the Board has determined by Order to be closely related to banking and permissible for bank holding companies. Unless otherwise noted, these activities will be conducted throughout the United States.

Each notice is available for inspection at the Federal Reserve Bank indicated. The notice also will be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the question whether the proposal complies with the standards of section 4 of the BHC Act.

Unless otherwise noted, comments regarding the applications must be received at the Reserve Bank indicated or the offices of the Board of Governors not later than May 24, 2011.

A. Federal Reserve Bank of Kansas City (Dennis Denney, Assistant Vice President) 1 Memorial Drive, Kansas City, Missouri 64198–0001:

1. *Denison Bancshares, Inc. of Holton,* Holton, Kansas; to retain 100 percent of the voting shares of Southview Apartments of Holton, LLC, Holton, Kansas, and thereby engage in community development activities, pursuant to section 225.28(b)(12)(i) of Regulation Y.

Board of Governors of the Federal Reserve System, May 4, 2011.

Robert deV. Frierson,

Deputy Secretary of the Board.

[FR Doc. 2011–11202 Filed 5–6–11; 8:45 am]

BILLING CODE P

FEDERAL TRADE COMMISSION

[File No. 102 3160]

Ceridian Corporation; Analysis of Proposed Consent Order to Aid Public Comment

AGENCY: Federal Trade Commission.

ACTION: Proposed Consent Agreement.

SUMMARY: The consent agreement in this matter settles alleged violations of Federal law prohibiting unfair or deceptive acts or practices or unfair methods of competition. The attached Analysis to Aid Public Comment describes both the allegations in the draft complaint and the terms of the consent order—embodied in the consent agreement—that would settle these allegations.

DATES: Comments must be received on or before June 2, 2011.

ADDRESSES: Interested parties may file a comment online or on paper, by following the instructions in the Request for Comment part of the **SUPPLEMENTARY INFORMATION** section below. Write "Ceridian, File No. 102 3160" on your comment, and file your comment online at *https://ftcpublic.commentworks.com/ftc/ceridian,* by following the instructions on the Web-based form. If you prefer to file your comment on paper, mail or deliver your comment to the following address: Federal Trade Commission, Office of the Secretary, Room H–113 (Annex D), 600 Pennsylvania Avenue, NW., Washington, DC 20580.

FOR FURTHER INFORMATION CONTACT: Tiffany George (202–326–3040) or Jamie Hine (202–326–2188), FTC, Bureau of Consumer Protection, 600 Pennsylvania Avenue, NW., Washington, DC 20580.

SUPPLEMENTARY INFORMATION: Pursuant to section 6(f) of the Federal Trade Commission Act, 38 Stat. 721, 15 U.S.C. 46(f), and § 2.34 the Commission Rules of Practice, 16 CFR 2.34, notice is hereby given that the above-captioned consent agreement containing a consent order to cease and desist, having been filed with and accepted, subject to final approval, by the Commission, has been placed on the public record for a period of thirty (30) days. The following Analysis to Aid Public Comment describes the terms of the consent agreement, and the allegations in the complaint. An electronic copy of the full text of the consent agreement package can be obtained from the FTC Home Page (for May 3, 2011), on the World Wide Web, at *http://www.ftc.gov/os/actions.shtm.* A paper copy can be obtained from the FTC Public Reference Room, Room 130–H, 600 Pennsylvania Avenue, NW, Washington, D.C. 20580, either in person or by calling (202) 326–2222.

You can file a comment online or on paper. For the Commission to consider your comment, we must receive it on or before June 2, 2011. Write "Ceridian, File No. 102 3160" on your comment. Your comment—including your name and your state—will be placed on the public record of this proceeding, including, to the extent practicable, on the public Commission Web site, at *http://www.ftc.gov/os/publiccomments.shtm.* As a matter of discretion, the Commission tries to remove individuals' home contact information from comments before placing them on the Commission Web site.

Because your comment will be made public, you are solely responsible for making sure that your comment doesn't include any sensitive personal information, like anyone's Social Security number, date of birth, driver's license number or other state identification number or foreign country equivalent, passport number, financial account number, or credit or debit card number. You are also solely responsible for making sure that your comment doesn't include any sensitive health information, like medical records or other individually identifiable health information. In addition, don't include any "[t]rade secret or any commercial or financial information which is obtained from any person and which is privileged or confidential," as provided in Section 6(f) of the FTC Act, 15 U.S.C. 46(f), and FTC Rule 4.10(a)(2), 16 CFR 4.10(a)(2). In particular, don't include competitively sensitive information such as costs, sales statistics, inventories, formulas, patterns, devices, manufacturing processes, or customer names.

If you want the Commission to give your comment confidential treatment, you must file it in paper form, with a request for confidential treatment, and you have to follow the procedure explained in FTC Rule 4.9(c), 16 CFR 4.9(c).[1] Your comment will be kept confidential only if the FTC General Counsel, in his or her sole discretion, grants your request in accordance with the law and the public interest.

Postal mail addressed to the Commission is subject to delay due to heightened security screening. As a result, we encourage you to submit your

[1] In particular, the written request for confidential treatment that accompanies the comment must include the factual and legal basis for the request, and must identify the specific portions of the comment to be withheld from the public record. *See* FTC Rule 4.9(c), 16 CFR 4.9(c).

comments online. To make sure that the Commission considers your online comment, you must file it at *https://ftcpublic.commentworks.com/ftc/ceridian,* by following the instructions on the Web-based form. If this Notice appears at *http://www.regulations.gov/#!home,* you also may file a comment through that Web site.

If you file your comment on paper, write "ACeridian, File No. 102 3160" on your comment and on the envelope, and mail or deliver it to the following address: Federal Trade Commission, Office of the Secretary, Room H–113 (Annex D), 600 Pennsylvania Avenue, NW., Washington, DC 20580. If possible, submit your paper comment to the Commission by courier or overnight service.

Visit the Commission Web site at *http://www.ftc.gov* to read this Notice and the news release describing it. The FTC Act and other laws that the Commission administers permit the collection of public comments to consider and use in this proceeding as appropriate. The Commission will consider all timely and responsive public comments that it receives on or before June 2, 2011. You can find more information, including routine uses permitted by the Privacy Act, in the Commission's privacy policy, at *http://www.ftc.gov/ftc/privacy.htm.*

Analysis of Agreement Containing Consent Order To Aid Public Comment

The Federal Trade Commission has accepted, subject to final approval, a consent order applicable to Ceridian Corporation.

The proposed consent order has been placed on the public record for thirty (30) days for receipt of comments by interested persons. Comments received during this period will become part of the public record. After thirty (30) days, the Commission will again review the agreement and the comments received, and will decide whether it should withdraw from the agreement and take appropriate action or make final the agreement's proposed order.

The Commission's complaint alleges that Ceridian is a service provider that, among other things, provides payroll processing, payroll-related tax filing, benefits administration, and other human resource services to business customers. The company operates a Web-based payroll processing service for small business customers in the United States under the name "Powerpay." Ceridian's customers enter their employees' personal information on the Powerpay Web site, which they use to automate payroll processing for their employees.

The complaint alleges that when customers enter their employees' personal information on the Powerpay Web site, the information is sent to computers on Ceridian's computer network for the purpose of computing payroll amounts and processing payroll checks and direct deposits. This personal information, in some instances, consists of name, address, e-mail address, telephone number, Social Security number, date of birth, and direct deposit account number. Such information—particularly Social Security numbers, which do not expire—can be used to facilitate identity theft, including existing and new account fraud, among other things. In addition, direct deposit account information can be used to facilitate theft.

The complaint alleges that Ceridian engaged in a number of practices that, taken together, failed to provide reasonable and appropriate security for the personal information it collected and maintained. Among other things, Ceridian: (1) Stored personal information in clear, readable text; (2) created unnecessary risks to personal information by storing it indefinitely on its network without a business need; (3) did not adequately assess the vulnerability of its Web applications and network to commonly known or reasonably foreseeable attacks, such as "Structured Query Language" ("SQL") injection attacks; (4) did not implement readily available, free or low-cost defenses to such attacks; and (5) failed to employ reasonable measures to detect and prevent unauthorized access to personal information. These practices are fundamental security failures. Each has been challenged in prior FTC data security cases, and each could have been remedied using well-known, readily available, and free or low-cost data security measures. In particular, SQL injection has been a well-known vulnerability for nearly a decade and is one of the most basic network vulnerabilities to address.

The complaint alleges that as a result of these failures, hackers executed an SQL injection attack on the Powerpay Web site and Web application. Through this attack, the hackers found personal information stored in Powerpay on Ceridian's network and exported the information of at least 27,673 individuals, including, in some instances, bank account numbers, Social Security Numbers, and dates of birth, over the Internet to outside computers. Given the sensitive nature of the personal information exposed, the company's failure to provide reasonable and appropriate security for this information is likely to cause consumers substantial injury as described above. That substantial injury is not offset by countervailing benefits to consumers or competition and is not reasonably avoidable by consumers. The complaint alleges that Ceridian's failure to employ reasonable and appropriate measures to prevent unauthorized access to sensitive personal information is an unfair act or practice, and that the company misrepresented that it had implemented such measures, in violation of Section 5 of the Federal Trade Commission Act.

The proposed order applies to personal information that Ceridian entities within the Commission's jurisdiction collect from or about consumers and employees. It contains provisions designed to prevent Ceridian from engaging in the future in practices similar to those alleged in the complaint.

Part I of the proposed order prohibits misrepresentations about the privacy, confidentiality, or integrity of personal information collected from or about consumers. Part II of the proposed order requires Ceridian to establish and maintain a comprehensive information security program that is reasonably designed to protect the security, confidentiality, and integrity of such information (whether in paper or electronic format) about consumers, employees, and those seeking to become employees. The security program must contain administrative, technical, and physical safeguards appropriate to Ceridian's size and complexity, the nature and scope of its activities, and the sensitivity of the information collected from or about consumers and employees. Specifically, the proposed order requires Ceridian to:

- Designate an employee or employees to coordinate and be accountable for the information security program;
- Identify material internal and external risks to the security, confidentiality, and integrity of personal information that could result in the unauthorized disclosure, misuse, loss, alteration, destruction, or other compromise of such information, and assess the sufficiency of any safeguards in place to control these risks;
- Design and implement reasonable safeguards to control the risks identified through risk assessment, and regularly test or monitor the effectiveness of the safeguards' key controls, systems, and procedures;
- Develop and use reasonable steps to select and retain service providers capable of appropriately safeguarding personal information they receive from Ceridian, and require service providers

by contract to implement and maintain appropriate safeguards; and

• Evaluate and adjust its information security programs in light of the results of testing and monitoring, any material changes to operations or business arrangements, or any other circumstances that it knows or has reason to know may have a material impact on its information security program.

Part III of the proposed order requires Ceridian to obtain within the first one hundred eighty (180) days after service of the order, and on a biennial basis thereafter for a period of twenty (20) years, an assessment and report from a qualified, objective, independent third-party professional, certifying, among other things, that: (1) It has in place a security program that provides protections that meet or exceed the protections required by Part II of the proposed order; and (2) its security program is operating with sufficient effectiveness to provide reasonable assurance that the security, confidentiality, and integrity of sensitive consumer, employee, and job applicant information has been protected. Two Ceridian subsidiaries, Ceridian Stored Value Solutions, Inc. and Comdata Network Inc., are excluded from this requirement to the extent that they do not advertise, market, promote, offer for sale, or sell any product or service relating to payroll, taxes, or human resources. Part III does not apply to payment cards provided to employers by Comdata Network Inc. that are not linked to accounts maintained by individual employees. Parts IV through VIII of the proposed order are reporting and compliance provisions. Part IV requires Ceridian to retain documents relating to its compliance with the order. For most records, the order requires that the documents be retained for a five-year period. For the third-party assessments and supporting documents, Ceridian must retain the documents for a period of three years after the date that each assessment is prepared. Part V requires dissemination of the order now and in the future to all current and future subsidiaries, current and future principals, officers, directors, and managers, and to persons with responsibilities relating to the subject matter of the order. Part VI ensures notification to the FTC of changes in corporate status. Part VII mandates that Ceridian submit a compliance report to the FTC within 60 days, and periodically thereafter as requested. Part VIII is a provision "sunsetting" the order after twenty (20) years, with certain exceptions.

The purpose of this analysis is to facilitate public comment on the proposed order. It is not intended to constitute an official interpretation of the proposed order or to modify its terms in any way.

By direction of the Commission.

Donald S. Clark,

Secretary.

[FR Doc. 2011–11183 Filed 5–6–11; 8:45 am]

BILLING CODE 6750–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

[CMS–1355–NR]

RIN 0938–AQ31

Medicare Program; Hospice Wage Index for Fiscal Year 2012

AGENCY: Centers for Medicare & Medicaid Services (CMS), HHS.

ACTION: Notice of CMS ruling.

SUMMARY: This notice announces a CMS Ruling that was signed on April 14, 2011 regarding CMS's determination to grant relief to any hospice provider that has a properly pending appeal (as defined in the Ruling) in any administrative appeals tribunal (that is, the Provider Reimbursement Review Board (PRRB), the Administrator of CMS, the Medicare fiscal intermediary hearing officer, or the CMS reviewing official) that seeks review of an overpayment determination for any hospice cap year (the period November 1 to October 31) ending on or before October 31, 2011 by challenging the validity of the beneficiary counting methodology set forth in 42 CFR 418.309(b)(1).

DATES: *Effective Date:* This notice of CMS ruling is effective April 14, 2011.

FOR FURTHER INFORMATION CONTACT: Lori Anderson, (410) 786–6190; Randy Throndset, (410) 786–0131.

SUPPLEMENTARY INFORMATION: The CMS Administrator signed Ruling CMS–1355–R on April 14, 2011. The text of the CMS Ruling is as follows:

CMS Rulings are decisions of the Administrator that serve as precedential final opinions and orders and statements of policy and interpretation. They are published under the authority of the Administrator of the Centers for Medicare & Medicaid Services (CMS).

CMS Rulings are binding on all CMS components, on all Department of Health & Human Services (HHS) components that adjudicate matters under the jurisdiction of CMS, and on the Social Security Administration (SSA) to the extent that components of the SSA adjudicate matters under the jurisdiction of CMS.

This Ruling provides notice of CMS's determination to grant relief to any hospice provider that has a properly pending appeal (as discussed herein) in any administrative appeals tribunal (that is, the Provider Reimbursement Review Board (PRRB), the Administrator of CMS, the Medicare fiscal intermediary hearing officer, or the CMS reviewing official) that seeks review of an overpayment determination for any hospice cap year (the period November 1 to October 31) ending on or before October 31, 2011 by challenging the validity of the beneficiary counting methodology set forth in 42 CFR 418.309(b)(1). In this regard, such a provider's hospice cap determination (as defined under 42 U.S.C. 1395f(i)(2)) for any cap year ending on or before October 31, 2011 and for which a timely appeal has been filed and is otherwise properly pending (as discussed herein) will be recalculated using a patient-by-patient proportional methodology for counting the number of Medicare beneficiaries as opposed to the methodology currently set forth in 42 CFR 418.309. This Ruling requires the appropriate Medicare contractor to identify each covered appeal and recalculate the aggregate cap. This Ruling also holds that, in light of the required recalculation, the pertinent administrative appeals tribunal will no longer have jurisdiction over the covered appeal and, therefore, directs the pertinent administrative appeals tribunal to remand each qualifying appeal to the appropriate Medicare contractor. Moreover, the Ruling explains how CMS and the contractor will recalculate the hospice provider's cap overpayment determination to account for beneficiaries who receive hospice services from the same hospice provider in multiple cap years using a methodology (the "patient-by-patient proportional methodology") that will allocate an individual beneficiary to multiple cap years based on the number of days the beneficiary receives service from the hospice in a given cap year relative to the total number of days in all cap years the beneficiary receives services from the hospice (or any hospice).

Medicare Program

Hospice

Hospice Appeals for Review of an Overpayment Determination.

Citations: 42 U.S.C. 1395f(i)(2) and 42 CFR parts 418 and 405

Background

In 1982, Congress amended the Medicare statute to provide coverage for hospice care under Part A. *See* Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA), Public Law 97–248, § 122, 96 Stat. 356, 364 (1982). The hospice benefit was designed to provide patients who are terminally ill (that is, life expectancy of six months or less) with comfort and pain relief, as well as emotional and spiritual support, generally in a home setting. Specifically, Medicare hospice services include nursing care, physical or occupational therapy, counseling, home health aide services, physicians' services, and short-term inpatient care, as well as drugs and medical supplies. 42 U.S.C. 1395x(dd)(1); *see also* 48 FR 56,008, 56,008 (Dec. 16, 1983) (describing hospice benefit).

The Medicare hospice benefit reflects a patient's choice to receive palliative care rather than curative care. The individual waives all rights to Medicare payments for treatment of the underlying terminal illness and related conditions by someone other than the individual's attending physician or the chosen hospice program. 42 U.S.C. 1395d(d)(2)(A).

Pursuant to 42 U.S.C. 1395f(i), Medicare pays hospice care providers on a per diem basis. *See* 42 CFR 418.302. The total payment to a hospice in an accounting year (November 1 to October 31, also known as the cap year) is limited, however, by a statutory cap. *See* 42 U.S.C. 1395f(i)(2)(A). Payments made in excess of the statutory cap are considered overpayments and must be refunded by the hospice care provider. *See* 42 CFR 418.308.

The statutory cap is calculated for each hospice care provider by multiplying the applicable "cap amount," which is updated annually, by the "number of Medicare beneficiaries in the hospice program in that year." 42 U.S.C. 1395f(i)(2)(A). The statute provides that the number of Medicare beneficiaries in a hospice program in an accounting year "is equal to the number of individuals who have made an election [to receive hospice care] and have been provided hospice care by (or under arrangements made by) the hospice program under this part in the accounting year, such number reduced to reflect the proportion of hospice care that each such individual was provided in a previous or subsequent accounting year or under a plan of care established by another hospice program." 42 U.S.C. 1395f(i)(2)(C).

In 1983, HHS adopted a rule that allocates hospice care on an aggregate basis by allocating each beneficiary entirely to the cap year in which he or she would be likely to receive the preponderance of his or her care. 48 FR 56,008, 56,022 (Dec. 16, 1983). The current regulation calculates the number of hospice beneficiaries as follows:

Those Medicare beneficiaries who have not previously been included in the calculation of any hospice cap and who have filed an election to receive hospice care, in accordance with § 418.24, from the hospice during the period beginning on September 28 (35 days before the beginning of the cap period) and ending on September 27 (35 days before the end of the cap period). 42 CFR 418.309(b)(1).

Once a beneficiary is counted for a given hospice, the beneficiary is not counted toward the hospice's cap in subsequent years if he or she continues to receive services from the hospice. Thus, under this methodology, a patient who receives services in multiple years is counted as 1.0 beneficiary in a single year, rather than as some fraction less than 1.0 in multiple years (with the fractions summing to 1.0).

Since its promulgation in 1983, the vast majority of hospice providers have not objected to the current counting methodology set forth in 42 CFR 418.309(b)(1). Of the thousands of hospice providers in the Medicare program, typically only a small percentage each year exceed the statutory cap. Of those hospices that do exceed the cap and are issued notices of overpayment determinations (calculated pursuant to the methodology set forth in 42 CFR 418.309(b)(1)), only a small percentage since FY 2006 have filed administrative appeals objecting to the current counting methodology.

In the April 24, 2009 "Hospice Wage Index For FY 2010" proposed rule (74 FR 18,912, 18,920–22) and in the July 22, 2010 "Hospice Wage Index for FY 2011" notice with comment period (75 FR 42,944, 42,950–51) CMS solicited comments on various options for modernizing the hospice aggregate cap, including an option which would proportionally allocate each individual beneficiary across all the cap years in which the beneficiary received hospice care in any hospice. We received 24 comments in 2009 and 26 comments in 2010 (some on behalf of groups) about the aggregate cap. A number of commenters, including associations, urged CMS to retain the existing cap calculation methodology set forth in 42 CFR 418.309(b)(1), as any changes to the current methodology would result in additional cost and burden to providers. The major hospice associations urged CMS to defer any major changes to the cap calculation methodology until the implementation of hospice payment reform, because of similar burden and cost concerns. Commenters also urged CMS to retain the current methodology as it results in a more streamlined and timely cap determination for providers as compared to other options considered, including any proportional methodology that allocates beneficiaries across more than one cap year. A significant advantage of the current 42 CFR 418.309(b)(1) methodology is that, once made, cap determinations can remain final without need to revise to account for situations in which the percentage of time a beneficiary received services in a prior cap year declines as his or her overall hospice stay continues into subsequent cap years. In contrast, a proportional methodology which allocates a beneficiary across more than one cap year leaves "final" determinations somewhat open-ended. Many who commented on the 2009 and 2010 final rules described above suggested that, because of these advantages, CMS adopt the current methodology as an option for providers even if CMS were to change its methodology to allow for cap determinations to be calculated on a patient-by-patient proportional basis. 75 FR at 42,950–51.

1. Current Litigation

The current method of counting beneficiaries set forth in § 418.309(b)(1) has been the subject of litigation. A small percentage of hospice providers have filed PRRB appeals challenging this methodology, seeking to have hospice overpayment determinations using this methodology invalidated. Many of these appeals have reached federal district court. To date, all federal district courts and the two courts of appeals that have directly ruled on the question have issued decisions concluding that this methodology is inconsistent with the plain language of the Medicare statute and have set aside these overpayment determinations. Some district courts have also enjoined CMS from using the methodology to calculate the plaintiff-hospice's cap determinations in future cap years. *See, e.g., Los Angeles Haven Hospice, Inc.* v. *Leavitt,* 2009 WL 5868513 (C.D. Cal. 2009), *affirmed in part,* ___ F.3d ___, 2011 WL 873303 (9th Cir. Mar. 15, 2011); *Lion Health Servs., Inc.* v. *Sebelius,* 689 F. Supp. 2d 849 (N.D. Tex. 2010), *affirmed in part,* ___ F.3d. ___, 2011 WL 834018 (5th Cir. Mar. 11, 2011); *Hospice of New Mexico, LLC,* v. *Sebelius,* No. CIV 09–145 (D.N.M. Mar.

5, 2010), *appeal pending,* No. 10–2136 (10th Cir.); *IHG Healthcare, Inc.* v. *Sebelius,* 717 F. Supp. 2d 696 (S.D. Tex. 2010), *appeal pending,* No. 10–20531 (5th Cir.); *Russell-Murray Hospice, Inc.* v. *Sebelius,* 724 F.Supp.2d 43 (D.D.C. 2010), *appeal pending,* No. 10–5311 (D.C. Cir.); *Affinity Healthcare Servs., Inc.* v. *Sebelius,* 2010 WL 4258989 (D.D.C. 2010), *appeal pending,* No. 11–5037 (D.C. Cir.).

CMS continues to believe that the methodology set forth in § 418.309(b)(1) is consistent with the Medicare statute, and in coordination with the Department of Justice it has filed appeals from adverse federal district court decisions. Nonetheless, CMS has determined that it is in the best interest of the agency and the Medicare program to take action to prevent future litigation and alleviate the litigation burden on providers, the agency, and the courts that already exists. To achieve these ends, CMS is issuing, contemporaneously with this Ruling, a proposed rule that sets forth the proposed hospice wage index for fiscal year (FY) 2012. In the FY 2012 hospice wage index proposed rule, CMS is proposing to revise the current methodology set forth at § 418.309(b)(1) to provide for application of a patient-by-patient proportional methodology (which is consistent with the proportional methodology described below in Section 2) for cap years 2012 and beyond, or, at the provider's election, application of the current methodology set forth in § 418.309(b)(1). CMS is also proposing to allow certain hospice providers that, as of the effective date of the proposed Rule, have not received the Medicare contractor's final cap determination for one or more cap years ending on or before October 31, 2011 to elect to have that determination calculated pursuant to a patient-by-patient proportional methodology.

2. Proportional Methodology

In order to provide relief to hospices that have properly pending appeals in which they challenge the validity of the existing methodology at 42 CFR 418.309(b)(1), CMS will apply a patient-by-patient proportional methodology pursuant to the implementation procedures set forth in Section 3 below. For purposes of this Ruling only, a "properly pending" appeal is one in which a provider has met all timeliness requirements set forth in section 1878 of the Social Security Act, Medicare regulations and other agency publications, guidelines, rulings, orders or rules.

Under the proportional methodology, each Medicare beneficiary who received hospice care in a cap year will be allocated to that hospice provider's cap year on the basis of a fraction. The numerator of the fraction will be the number of patient days for that beneficiary in that hospice for that cap year (which will be determined after the end of the cap year and is therefore generally a fixed number) and the denominator will be the total number of all patient days for that beneficiary in all cap years in which the beneficiary received hospice services (using the best available data at the time of the calculation). The individual beneficiary counts for a given cap year will then be summed to compute the hospice's total aggregate beneficiary count (number of Medicare beneficiaries) for that cap year. A new payment cap will be calculated and a notice of overpayment determination will be issued for that cap year to the hospice provider.

It may be the case that, at the time of the recalculation using this patient-by-patient proportional methodology, a hospice beneficiary is still continuing to receive hospice services and his or her overall hospice stay has not ended. Because of the need to give a hospice provider prompt notice of its final payment determination and to promptly collect any newly calculated overpayment, the Medicare contractor will not wait until all patients have ended their hospice stays (that is, they have expired or otherwise left hospice care) before recalculating the final payment determination for a given year. For each beneficiary, the Medicare contractor will use the best data available at the time regarding the total number of hospice patient days in all years to perform the recalculation. The impact of this methodology will be that the fractional allocations for some patients might be overstated (never understated) in the sense that the denominator might not include patient days for services received after the date of the calculation. The cap for any cap year which includes that beneficiary would therefore be overstated as well (again, never understated).

Hospice cap determinations issued pursuant to this Ruling are subject to reopening, under CMS's normal reopening regulations, to recalculate beneficiary fractional allocations when more recent data regarding those beneficiaries are available. A particular beneficiary's fractional allocation for that cap year might decrease—and the payment cap decrease correspondingly—because the denominator of the fraction for the beneficiary may include data regarding additional days of care received in later cap years which were not available at the date of the preceding calculation. It also should be noted that, in some cases, a hospice beneficiary may receive hospice services in three or four cap years (or more). Under the patient-by-patient proportional methodology, some proportion of a hospice beneficiary's patient days will be counted toward the hospice cap in each and every cap year he or she receives hospice services.

Implementation of This Ruling

3. Implementation by CMS and the Medicare Contractors

In order to resolve in an orderly manner timely pending administrative appeals in which hospice providers seek review of overpayment determinations by challenging the validity of the methodology set forth in 42 CFR 418.309(b)(1) and for which relief is afforded in this Ruling, the appropriate Medicare contractor shall identify each properly pending administrative appeal in which a hospice challenges an overpayment demand calculated pursuant to 42 CFR 418.309(b)(1), notify the appropriate administrative tribunal that the appeal is covered by this ruling, and recalculate the aggregate cap using the patient-by-patient proportional methodology described in Section 2 of this Ruling. As explained above, each recalculation will be performed using the best data available as to the overall number of hospice patient days for each beneficiary (the denominator of the fractional allocation) at the time the calculation is performed. The Medicare contractor will include the hospice cap overpayment determination in a new determination of program reimbursement letter which shall serve as a notice of program reimbursement (NPR) under 42 CFR 405.1803(a)(3). The revised overpayment determination contained therein will be subject to administrative and judicial review in accordance with the applicable jurisdictional and procedural requirements of section 1878 of the Act, the Medicare regulations, and other agency rules and guidelines.

Many hospice providers prefer the current methodology and have not objected to it. For all hospice providers that have never filed an administrative appeal challenging a cap overpayment determination alleging the invalidity of 42 CFR 418.309(b)(1), Medicare contractors will continue to issue hospice cap determinations based upon the methodology currently set forth in 42 CFR 418.309(b)(1) for any cap year ending on or before October 31, 2011, unless CMS adopts a rule providing

otherwise in the hospice wage index final rule for FY 2012. This Ruling applies to cap years prior to the cap year ending October 31, 2012. The methodology for calculating cap determinations for cap years ending October 31, 2012 and later will be addressed in the hospice wage index final rule for FY 2012.

4. Implementation by the Administrative Appeals Tribunals

a. Implementation Procedure

In light of this Ruling, the administrative appeals tribunals no longer have jurisdiction over properly pending administrative appeals challenging overpayment determinations calculated pursuant to 42 CFR 418.309(b)(1). On receiving notification from a Medicare contractor that an appeal is covered by this Ruling, administrative appeals tribunals shall remand covered appeals to the Medicare contractor. If an administrative appeals tribunal determines that an appeal is covered by this ruling prior to receiving notification from a Medicare contractor, the tribunal may, on its own motion, remand the appeal to the appropriate Medicare contractor for a recalculation of the aggregate cap as described in Section 2 of this Ruling.

However, if the administrative tribunal finds that a given claim is outside the scope of the Ruling (because such claim does not challenge the existing hospice cap methodology) or an appeal is not properly pending, as described in the first paragraph of Section 2, then the appeals tribunal will issue a written order, briefly explaining why the tribunal found that such claim is not subject to the Ruling. The appeals tribunal will then process the provider's original appeal of the same claim in accordance with the tribunal's usual, generally applicable appeal procedures.

b. "Mixed" Appeals Where Some Claims Are, But Other Claims Are Not, Subject to the Ruling

We note that it is possible that a given administrative appeal might include some claims that qualify for relief under this Ruling, along with other claims that are not subject to the Ruling. If the administrative tribunal finds that only some, but not all, of the specific claims raised in a given appeal qualify for relief under this Ruling, then the appeals tribunal should remand to the contractor, for recalculation of the hospice cap, only the particular claims for which the Ruling was deemed applicable by the appeals tribunal. The other claims in such appeal which the appeals tribunal found did not qualify for relief under the Ruling should be processed in accordance with the tribunal's usual, generally applicable appeal procedures.

Similarly, if the Medicare contractor finds that some, but not all, of the particular claims at issue in an appeal are subject to the Ruling, then the contractor should recalculate the hospice's cap overpayment determination, in accordance with the applicable provisions of the Ruling. As for the remaining claims in such appeal which the contractor found were not subject to the Ruling, the provider may resume without prejudice its original appeal of such claims before the administrative tribunal that previously remanded the claims to the contractor under the alternative implementation procedure. If the provider elects to resume its original appeal of such claims, then those claims should be processed in accordance with the tribunal's usual, generally applicable appeal procedures.

c. Requests for Review of a Finding That a Claim Is Not Subject to the Ruling

We recognize that, if a specific claim were found outside the scope of, or not in compliance with all applicable timeliness requirements for, relief under this Ruling, then the provider might consider seeking administrative and judicial review of such a finding. For example, if a Medicare contractor were to find that a specific appeal seeking review of an overpayment determination was filed outside the time limits set forth in section 1878 of the Social Security Act and thus was outside the scope of the Ruling, then the provider might elect to resume its original PRRB appeal of the same claim, and ask the PRRB to review the contractor's finding that the Ruling was not applicable to the claim. Similarly, if the PRRB were to find that the Ruling did not apply to a provider's appeal because the provider did not meet one of the PRRB's procedural requirements (such as the requirement of the timely filing of appropriate position papers) or the PRRB were to find that the appeal did not challenge the validity of 42 CFR 418.309(b)(1), then the provider might seek review by the Administrator of CMS of the PRRB's finding that its appeal did not qualify for relief under this Ruling.

This Ruling does not address whether the Medicare statute and regulations would support, under any circumstances, administrative and judicial review of a provider's challenge to a finding that a particular claim is not subject to the Ruling. Nonetheless, we believe that it is appropriate to address the timing of any administrative and judicial review of a provider's challenge to a finding that a specific claim is outside the scope of the Ruling or does not satisfy all applicable requirements for relief under the Ruling. [[[Accordingly, it is hereby held that the administrative appeals tribunals may not review or decide a provider's interlocutory appeal of a finding, whether made by an appeals tribunal or by a Medicare contractor, that a specific claim is outside the scope of the Ruling or that such claim does not satisfy all applicable timeliness requirements for relief under the Ruling. Instead of reviewing or deciding any such interlocutory appeal, the pertinent administrative appeals tribunal should address, through its usual, generally applicable appeal procedures, the provider's challenge to a finding that a specific claim is not subject to the Ruling. Moreover, the administrative appeals tribunal should not review or decide the "merits" of a provider's challenge to a finding that a particular claim is outside the scope of the Ruling or that such claim is not a properly pending appeal, unless and until the appeals tribunal were to conclude specifically that the Medicare statute and regulations support subject matter jurisdiction over the provider's challenge to a finding that the Ruling does not apply to a particular claim. Also, if the administrative appeals tribunal were to decide whether the same appeals tribunal or a different administrative tribunal had jurisdiction over a provider's challenge to a finding that a specific claim is not subject to the Ruling, the tribunal should issue a written decision that includes an explanation of the specific legal and factual bases for the tribunal's jurisdictional ruling.

5. Appeals and Reopenings of Hospice Cap Recalculations Made Pursuant to This Ruling and Based Upon the Application of the Patient-by-Patient Proportional Methodology

Just as hospice cap determinations based on application of the existing methodology in 42 CFR 418.309 are subject to administrative appeal in accordance with 42 CFR 418.311 (which refers to 42 CFR part 405, subpart R), under this Ruling hospice cap determinations that are recalculated based on application of the patient-by-patient proportional methodology are determinations subject to administrative appeal (in accordance with 42 CFR 418.311) and ultimately judicial review, after the contractor has issued a cap determination and if all applicable requirements for administrative and

judicial review are met. Pursuant to 42 CFR 418.311 (which incorporates 42 CFR part 405, subpart R), the provider may appeal an intermediary's cap determination in accordance with the requirements contained in either 42 CFR 405.1811 or 42 CFR 405.1835, whichever is applicable. In accordance with the applicable regulations, any such appeal must be filed to the appropriate authority no later than 180 days from the date of the contractor's determination. If a provider properly pursues and exhausts the administrative appeals process and receives a final agency decision, the final agency decision is subject to judicial review in accordance with 42 CFR part 405, subpart R and 42 U.S.C. 1395oo.

In addition, all hospice cap determinations based on application of a patient-by-patient proportional methodology are subject to reopening (for up to 3 years in accordance with the requirements of 42 CFR 405.1885). Thus, a hospice cap payment determination made pursuant to this Ruling may be reopened at a later time (*e.g.,* to revise the proportional allocations to account for additional days of care after the year in question, which would increase the denominators of some proportions and thus decrease some fractional allocations). We recognize that this might increase uncertainty, but this concern must be balanced against other considerations such as payment accuracy and timeliness of payment determinations. Nothing in this Ruling, however, shall be construed as requiring reopening and recalculation of cap determinations for an earlier year when there is a recalculation for any given year.

Ruling

First, it is CMS' Ruling that the agency and the Medicare contractors will resolve and grant relief in each properly pending appeal in which a hospice provider seeks review of a final determination of overpayment for a cap year ending on or before October 31, 2011 by challenging the validity of the methodology set forth in 42 CFR 418.309(b)(1). CMS will grant relief in each appeal by directing its Medicare contractors to recalculate the final overpayment determination in accordance with the patient-by-patient proportional methodology described in Section 2 of this Ruling.

Second, it is also CMS' Ruling that the pertinent administrative appeals tribunal (that is, the PRRB, the Administrator of CMS, the fiscal intermediary hearing officer, or the CMS reviewing official) and the appropriate Medicare contractor will process, in accordance with the instructions set forth in Sections 3 and 4 of this Ruling, each appeal (including any interlocutory appeals) and each putative claim (in such appeal) seeking review of a hospice cap overpayment determination for a cap year ending on or before October 31, 2011 on the basis that the methodology set forth in 42 CFR 418.309(b)(1) is invalid.

Third, it is CMS' further Ruling that the agency and the appropriate Medicare contractor will process, in accordance with the instructions set forth in Section 5 of this Ruling, each properly pending appeal seeking review of a hospice cap overpayment determination for a cap year ending on or before October 31, 2011 on the basis that the methodology set forth in 42 CFR 418.309(b)(1) is invalid and that is remanded by the administrative appeals tribunal and is found to qualify for relief under this Ruling.

Fourth, it is CMS' further Ruling that, pursuant to 42 CFR 405.1801(a), 405.1885(c)(1), (2), this Ruling is not an appropriate basis for the reopening of final determinations of the Secretary or a Medicare contractor or of any decision by a reviewing entity, except to the extent that this Ruling provides for reopening in accordance with existing regulations and policy; accordingly, it is hereby held that this Ruling does not provide an independent basis for the administrative appeals tribunals, the fiscal intermediaries, and other Medicare contractors to reopen any final hospice cap determination in a manner inconsistent with existing regulations and policy.

Fifth, it is also CMS' Ruling that, pursuant to 42 CFR 401.108, this Ruling is a final precedent opinion and order and a binding statement of policy that does not give rise to any putative retroactive rulemaking issues; in any event, it is hereby held that, if this Ruling were deemed to implicate potential retroactive rulemaking issues, then, in accordance with 42 U.S.C. 1395hh(e)(1)(A), retroactive application of this Ruling is necessary to ensure continuing compliance with 42 U.S.C. 1395f(i)(2) and to serve the public interest.

Sixth, it is also CMS' Ruling that, pursuant to 42 CFR 401.108, this Ruling is a final precedent opinion and order and a binding statement of policy. This Ruling is not a substantive or legislative rule requiring notice and comment; to the extent that this Ruling is deemed to be a substantive or legislative rule, it is CMS's Ruling that good cause exists to dispense with rulemaking procedures pursuant to 42 U.S.C. 1395hh(b)(2)(C) and 5 U.S.C. 553(b)(B) to ensure continued compliance with 42 U.S.C. 1395f(i)(2).

(Catalog of Federal Domestic Assistance Program No. 93.773 Medicare—Hospital Insurance Program; and No. 93.774, Medicare—Supplementary Medical Insurance Program)

Dated: April 14, 2011.

Donald M. Berwick,

Administrator, Centers for Medicare & Medicaid Services.

[FR Doc. 2011–10694 Filed 4–28–11; 4:15 pm]

BILLING CODE 4120–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Alcohol Abuse and Alcoholism; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute on Alcohol Abuse and Alcoholism Initial Review Group, Clinical, Treatment and Health Services Research Review Subcommittee.

Date: July 12, 2011.

Time: 8 a.m. to 6:30 p.m.

Agenda: To review and evaluate grant applications.

Place: Hyatt Regency Bethesda, One Bethesda Metro Center, 7400 Wisconsin Avenue, Bethesda, MD 20814.

Contact Person: Katrina L Foster, PhD, Scientific Review Officer, National Institute on Alcohol Abuse & Alcoholism, National Institutes of Health, 5635 Fishers Lane, Rm. 2019, Rockville, MD 20852, 301–443–4032, *katrina@mail.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.271, Alcohol Research Career Development Awards for Scientists and Clinicians; 93.272, Alcohol National Research Service Awards for Research Training; 93.273, Alcohol Research Programs; 93.891, Alcohol Research Center Grants; 93.701, ARRA Related Biomedical Research and Research Support Awards, National Institutes of Health, HHS)

Dated: May 2, 2011.

Jennifer S. Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2011–11210 Filed 5–6–11; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Eunice Kennedy Shriver National Institute of Child Health & Human Development; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The contract proposals and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the contract proposals, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Child Health and Human Development Special Emphasis Panel, Systematic Review of Neonatal Medicine.

Date: May 23, 2011.

Time: 1 p.m. to 3 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6100 Executive Boulevard, Rockville, MD 20852, (Telephone Conference Call.)

Contact Person: Sathasiva B. Kandasamy, PhD, Scientific Review Officer, Division of Scientific Review, Eunice Kennedy Shriver National Institute of Child Health and Human Development, NIH, 6100 Executive Blvd., Room 5B01, Bethesda, Md 20892, 301–435–6680, *skandasa@mail.nih.gov*.

(Catalogue of Federal Domestic Assistance Program Nos. 93.864, Population Research; 93.865, Research for Mothers and Children; 93.929, Center for Medical Rehabilitation Research; 93.209, Contraception and Infertility Loan Repayment Program, National Institutes of Health, HHS)

Dated: May 3, 2011.

Jennifer S. Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2011–11201 Filed 5–6–11; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center for Scientific Review; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Center for Scientific Review Special Emphasis Panel, *PAR—09–214:* NHLBI Systems Biology.

Date: May 23–24, 2011.

Time: 8 a.m. to 7 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Virtual Meeting.)

Contact Person: Ai-Ping Zou, MD, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4118, MSC 7814, Bethesda, MD 20892, 301–435–1777, *zouai@csr.nih.gov.*

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

Name of Committee: Molecular, Cellular and Developmental Neuroscience Integrated Review Group, Neurodifferentiation, Plasticity, and Regeneration Study Section.

Date: June 1–2, 2011.

Time: 8 a.m. to 4 p.m.

Agenda: To review and evaluate grant applications.

Place: Westin Alexandria, 400 Courthouse Square, Alexandria, VA 22314.

Contact Person: Carole L Jelsema, PhD, Chief and Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4176, MSC 7850, Bethesda, MD 20892, (301) 435–1248, *jelsemac@csr.nih.gov.*

Name of Committee: Molecular, Cellular and Developmental Neuroscience Integrated Review Group, Cellular and Molecular Biology of Glia Study Section.

Date: June 2–3, 2011.

Time: 8 a.m. to 4 p.m.

Agenda: To review and evaluate grant applications.

Place: Hyatt Regency Bethesda, One Bethesda Metro Center, 7400 Wisconsin Avenue, Bethesda, MD 20814.

Contact Person: Toby Behar, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4136, MSC 7850, Bethesda, MD 20892, (301) 435–4433, *behart@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel, Macromolecular Structure and Function C.

Date: June 9, 2011.

Time: 10 a.m. to 11 a.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Telephone Conference Call.)

Contact Person: John L. Bowers, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4170, MSC 7806, Bethesda, MD 20892, (301) 435–1725, *bowersj@csr.nih.gov.*

Name of Committee: Cardiovascular and Respiratory Sciences Integrated Review Group, Clinical and Integrative Cardiovascular Sciences Study Section.

Date: June 16–17, 2011.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: The Allerton Hotel, 701 North Michigan Avenue, Chicago, IL 60611.

Contact Person: Russell T Dowell, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4128, MSC 7814, Bethesda, MD 20892, (301) 435–1850, *dowellr@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel, *Small Business:* Medical Imaging.

Date: June 16–17, 2011.

Time: 8 a.m. to 3 p.m.

Agenda: To review and evaluate grant applications.

Place: Washington Marriott Wardman Park Hotel, 2660 Woodley Road, NW., Washington, DC 20008.

Contact Person: Leonid V. Tsap, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5128, MSC 7854, Bethesda, MD 20892, (301) 435–2507, *tsapl@csr.nih.gov.*

Name of Committee: Immunology Integrated Review Group, Innate Immunity and Inflammation Study Section.

Date: June 16–17, 2011.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Gaylord National Hotel & Convention Center, 201 Waterfront Street, National Harbor, MD 20745.

Contact Person: Tina McIntyre, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4202, MSC 7812, Bethesda, MD 20892, 301–594–6375, *mcintyrt@csr.nih.gov.*

Name of Committee: Molecular, Cellular and Developmental Neuroscience Integrated Review Group, Biophysics of Neural Systems Study Section.

Date: June 16–17, 2011.

Time: 8 a.m. to 1 p.m.

Agenda: To review and evaluate grant applications.

Place: Washington Plaza Hotel, 10 Thomas Circle, NW., Washington, DC 20005.

Contact Person: Geoffrey G Schofield, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4040–A, MSC 7850, Bethesda, MD 20892, 301–435–1235, *geoffreys@csr.nih.gov*.

Name of Committee: Cardiovascular and Respiratory Sciences Integrated Review Group, Myocardial Ischemia and Metabolism Study Section.

Date: June 16–17, 2011.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Hilton Alexandria Old Town, 1767 King Street, Alexandria, VA 22314.

Contact Person: Joseph Thomas Peterson, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4118, MSC 7814, Bethesda, MD 20892, 301–443–8130, *petersonjt@csr.nih.gov*.

Name of Committee: Infectious Diseases and Microbiology Integrated Review Group, Bacterial Pathogenesis Study Section.

Date: June 16, 2011.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Donovan House, 1155 14th Street, NW., Washington, DC 20005.

Contact Person: Richard G Kostriken, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3192, MSC 7808, Bethesda, MD 20892, 301–402–4454, *kostrikr@csr.nih.gov*.

Name of Committee: Infectious Diseases and Microbiology Integrated Review Group, Virology—B Study Section.

Date: June 16–17, 2011.

Time: 8:30 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: The Westin St. Francis, 335 Powell Street, San Francisco, CA 94102.

Contact Person: John C Pugh, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 1206, MSC 7808, Bethesda, MD 20892, (301) 435–2398, *pughjohn@csr.nih.gov*.

Name of Committee: Infectious Diseases and Microbiology Integrated Review Group, Virology—A Study Section.

Date: June 16–17, 2011.

Time: 8:30 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: The Westin St. Francis, 335 Powell Street, San Francisco, CA 94102.

Contact Person: Joanna M Pyper, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3198, MSC 7808, Bethesda, MD 20892, (301) 435–1151, *pyperj@csr.nih.gov*.

(Catalogue of Federal Domestic Assistance Program Nos. 93.306, Comparative Medicine; 93.333, Clinical Research, 93.306, 93.333, 93.337, 93.393–93.396, 93.837–93.844, 93.846–93.878, 93.892, 93.893, National Institutes of Health, HHS)

Dated: May 3, 2011.

Jennifer S. Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2011–11204 Filed 5–6–11; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Substance Abuse and Mental Health Services Administration

Agency Information Collection Activities: Submission for OMB Review; Comment Request

Periodically, the Substance Abuse and Mental Health Services Administration (SAMHSA) will publish a summary of information collection requests under OMB review, in compliance with the Paperwork Reduction Act (44 U.S.C. Chapter 35). To request a copy of these documents, call the SAMHSA Reports Clearance Officer on (240) 276–1243.

Project: Access to Recovery (ATR) Program (OMB No. 0930–0266)—Revision

The Center for Substance Abuse Treatment (CSAT) is charged with implementing the Access to Recovery (ATR) program which will allow grantees (States, Territories, the District of Columbia and Tribal Organizations) a means to implement voucher programs for substance abuse clinical treatment and recovery support services. The ATR program is part of a Presidential initiative to: (1) Provide client choice among substance abuse clinical treatment and recovery support service providers, (2) expand access to a comprehensive array of clinical treatment and recovery support options (including faith-based programmatic options), and (3) increase substance abuse treatment capacity. Monitoring outcomes, tracking costs, and preventing waste, fraud and abuse to ensure accountability and effectiveness in the use of Federal funds are also important elements of the ATR program. Grantees, as a contingency of their award, are responsible for collecting Voucher Information (VI) [OMB (OMB No. 0930–0266); Expiration Date 05/31/2011] and Voucher Transaction (VT)[(OMB No. 0930–0266; 05/31/2011)] data from their clients.

The primary purpose of this data collection activity is to meet the reporting requirements of the Government Performance and Results Act (GPRA) by allowing SAMHSA to quantify the effects and accomplishments of SAMHSA programs. The following table is an estimated annual response burden for this effort.

ESTIMATES OF ANNUALIZED HOUR BURDEN [1]

Center/form/respondent type	Number of respondent	Responses per respondent	Total responses	Hours per response	Total hour burden	Total wage cost	Total hour cost/respondent [1]
Voucher information and transaction	53,333	1.5	80,000	.03	2,400	$18.40	$44,160

[1] This table represents the maximum additional burden if adult respondents for ATR provide responses/data at an estimated hourly wage (from 2010 Bureau of Labor Statistics).

Written comments and recommendations concerning the proposed information collection should be sent by June 8, 2011 to: SAMHSA Desk Officer, Human Resources and Housing Branch, Office of Management and Budget, New Executive Office Building, Room 10235, Washington, DC 20503; due to potential delays in OMB's receipt and processing of mail sent through the U.S. Postal Service, respondents are encouraged to submit comments by fax to: 202–395–7285.

Dated: April 29, 2011.

Elaine Parry,

Director, Office of Management, Technology and Operations.

[FR Doc. 2011–11198 Filed 5–6–11; 8:45 am]

BILLING CODE 4162–20–P

DEPARTMENT OF HOMELAND SECURITY

Office of the Secretary

[Docket No. DHS–2011–0030]

Privacy Act of 1974; Department of Homeland Security/United States Citizenship and Immigration Services—DHS/USCIS–011 E-Verify Program System of Records

AGENCY: Privacy Office, DHS.

ACTION: Notice of Privacy Act system of records.

SUMMARY: In accordance with the Privacy Act of 1974, the Department of Homeland Security proposes to update and reissue a current Department of Homeland Security system of records titled "Department of Homeland Security/United States Citizenship and Immigration Services—011 E-Verify Program System of Records." The United States Citizenship and Immigration Services E-Verify Program allows employers to check citizenship status and verify employment eligibility of newly hired employees. The Department of Homeland Security is updating this Privacy Act System of Records Notice for the E-Verify Program in order to provide notice that E-Verify is: (1) Adding a new category of records derived from participating Motor Vehicle Agencies' systems through the American Association of Motor Vehicle Administrators Network; (2) adding a new category of records derived from individual employees subject to employment verification; and (3) changing the verification process to include the validation of information from a driver's license, driver's permit, or identification card from a state or jurisdiction that has signed a Memorandum of Agreement with the Department of Homeland Security under the Records and Information from Departments of Motor Vehicles for E-Verify program. These changes are more thoroughly spelled out in an accompanying E-Verify Privacy Impact Assessment update, which is found on the Department of Homeland Security Privacy Web site (*http://www.dhs.gov/privacy*). This updated system is included in the Department of Homeland Security's inventory of record systems.

DATES: Submit comments on or before June 8, 2011. This updated system will be effective June 8, 2011.

ADDRESSES: You may submit comments, identified by docket number DHS–2011–0030 by one of the following methods:

- *Federal e-Rulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Fax:* 703–483–2999.
- *Mail:* Mary Ellen Callahan, Chief Privacy Officer, Privacy Office, Department of Homeland Security, Washington, DC 20528.
- *Instructions:* All submissions received must include the agency name and docket number for this rulemaking. All comments received will be posted without change to *http://www.regulations.gov,* including any personal information provided.
- *Docket:* For access to the docket to read background documents or comments received go to *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: For general questions, please contact: Janice Jackson, Acting Privacy Branch Chief, Verification Division, U.S. Citizenship and Immigration Services, Department of Homeland Security, Washington, DC 20528. For privacy issues please contact: Mary Ellen Callahan (703–235–0780), Chief Privacy Officer, Privacy Office, Department of Homeland Security, Washington, DC 20528.

SUPPLEMENTARY INFORMATION:

I. Background

In accordance with the Privacy Act of 1974, 5 U.S.C. 552a, the Department of Homeland Security (DHS) United States Citizenship and Immigration Services (USCIS) proposes to update and reissue a current DHS system of records titled "DHS/USCIS—011 E-Verify Program System of Records."

The USCIS E-Verify Program allows employers to check citizenship status and verify employment eligibility of newly hired employees. DHS is updating this Privacy Act System of Records Notice for the E-Verify Program in order to provide notice that E-Verify is: (1) Adding a new category of records derived from participating Motor Vehicle Agencies' (MVA) systems through the American Association of Motor Vehicle Administrators Network (AAMVAnet™); (2) adding a new category of records derived from individual employees subject to employment verification; and (3) changing the verification process to include the validation of information from a driver's license, driver's permit, or identification card from states or jurisdictions that have signed a Memorandum of Agreement (MOA) with DHS USCIS under the AAMVAnet™ Records and Information from Departments of Motor Vehicles for E-Verify (RIDE) program.

E-Verify is mandated by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Public Law (Pub. L.) 104–208, September 30, 1996. The program is a free and, in most cases, voluntary DHS program implemented by USCIS and operated in collaboration with the Social Security Administration (SSA). The program compares information provided by employees on the Employment Eligibility Verification Form (Form I–9) against information in SSA and DHS databases in order to verify an employee's employment eligibility.

All U.S. employers are responsible for the completion and retention of Form I–9 for each individual, whether citizen or non-citizen, they hire for employment in the United States. On Form I–9, the employer must verify the employment eligibility and identity documents presented by the employee and record the document information on Form I–9.

The Immigration and Naturalization Service (INS) initially developed the predecessor to E-Verify, the Basic Pilot Program, as a voluntary pilot program as required by IIRIRA. When Congress created DHS, it incorporated INS programs under DHS and USCIS was charged with operating the Basic Pilot Program. In addition to changing the name of the Basic Pilot Program, USCIS has continued to develop the program as the requirements for employment verification have changed over time. The program is in most cases voluntary. However, both Federal employees and those employees working on Federal contracts are required to have their work authorization eligibility verified by E-Verify. Contractors have the discretion to verify all employees through E-Verify whether or not they are working on Federal contracts. In addition, some states require the use of E-Verify for state employees while others require its use by all employers located within their state or by all state job services.

E-Verify is a fully operational, Web-based program that allows any employer to enroll and verify employees' employment eligibility.

DHS is updating and reissuing the E-Verify SORN to provide notice of the additional data that may be used by E-Verify in the verification process, specifically the automation of motor vehicle document verification between MVAs and E-Verify employers through the RIDE initiative.

The RIDE initiative enhances E-Verify by providing employers the ability to validate information from the most commonly presented identity documents for employment authorization: An employee's driver's license, driver's permit, or state-issued identification card, against MVA data

when the issuing state or jurisdiction of those documents has established an MOA with DHS USCIS to participate in RIDE and allow verification of this information.

Currently, E-Verify collects only limited information about documents presented during the Form I–9 and E-Verify process; however, this is limited to U.S. Passports and documents presented by Non-U.S. Citizens. For other documents, E-Verify collects only the documents presented from list B & C of the Form I–9 Lists of Acceptable Documents. An example of a Form I–9 List B document is a driver's license or state issued identification card. An example of a Form I–9 List C document is a Social Security card or certified birth certificate.

If an individual presents a document from list B & C of the Form I–9, E-Verify will now also collect the document type, expiration date, and the state or jurisdiction of issuance. In addition, E-Verify will collect the document number in cases where an MOA exists between the issuing state or jurisdiction and DHS USCIS. E-Verify collects the document expiration date in order to determine whether the individual presented an unexpired identity document in order to meet the Form I–9 requirement. E-Verify collects the issuing state or jurisdiction of the document to direct its query to the appropriate MVA database for validation of the document's information, and to project potential workload as additional states sign on to participate in RIDE. E-Verify collects the document type for each case to project potential workload as additional states sign MOAs with DHS USCIS to participate in RIDE. E-Verify collects the document number to validate information from the document presented with the issuing MVA and only in cases where the issuing state or jurisdiction has established an MOA with DHS USCIS to do so.

The RIDE initiative, including the associated Tentative Non-Confirmation (TNC) process, is more fully discussed in the description of the E-Verify process below.

The addition of the RIDE functionality to E-Verify is an important step in ensuring that individuals do not gain employment authorization through the misuse of state-issued identity documents in E-Verify.

The following describes the complete E-Verify process, including the new RIDE enhancement.

Enrollment

E-Verify participants may be one of two different classes of user types: (1) Employers who use E-Verify for their own employees; or (2) designated agents who use E-Verify for the employees of other companies. Employer agents (previously called designated agents) usually query E-Verify as a commercial service for other employers that cannot, or choose not, to conduct the E-Verify queries but who want the benefit of the program. To use E-Verify, employers and employer agents must first enroll their company online at *http://www.dhs.gov/E-Verify.* They complete a registration application that collects basic contact information including: Company name, company street address, employer identification number, North American Industry Classification System (NAICS) Code, number of employees, number of employment sites, parent company or corporate company, name of company Point of Contact (POC) for E-Verify Usage, POC phone number, POC fax number, and POC e-mail address.

Participants, whether an employer or employer agent, can then create user accounts for the employees who have access to E-Verify. A user may be one of three user types:

- *General User:* This user type performs verification queries, views reports, and has the capability to update their personal user account.
- *Program Administrator:* This user type is responsible for creating user accounts at their site for other Program Administrators and General Users. They have the responsibility to view reports, perform queries, update account information, and unlock user accounts if a user has locked the account by entering the wrong password.
- *Corporate Administrator:* This user type can view reports for all companies associated with the E-Verify corporate account. This allows them to see the activities associated with each general user. They can also update user accounts, register new locations and users, terminate access for existing locations, and perform site and user maintenance activities for all sites and users associated with the corporate account. Each company can have a single corporate administrator.

E-Verify collects information about the user so that the program can review and identify the use of the system by employers, and allows the program to see more detailed information about user system usage. The information collected specifically on users includes: Name (last, first, middle initial), phone number, fax number, e-mail address, and User ID.

Every E-Verify participating employer is required to read and sign a Memorandum of Understanding (MOU) that explains the responsibilities of DHS, SSA, and the participant. Once the E-Verify participant has completed the enrollment form, E-Verify e-mails a unique user login and password to the user. The employer must conspicuously display E-Verify posters (posters are found on the Web site and are printed out by each employer) at the hiring site that indicate the employer's participation in E-Verify and describe the employees' rights regarding the employer's participation in the program.

E-Verify Verification Process

Once employers enroll in E-Verify, they must verify the employment eligibility of all new employees hired thereafter by entering the employee's name, date of birth (DOB), Social Security Number (SSN), and information about the documents provided by the employee during the Form I–9 process, into the E-Verify online user interface tool. For some documents presented during the Form I–9 process, E-Verify also collects the expiration date as entered by the employer and compares it against the hire date entered by the employer to make sure that the document is unexpired. Due to the fact that employers can now enter hire dates up to 365 days in the future in E-Verify, the document is still acceptable if it is expired on the future date of hire—the day an employee starts work for pay—so long as it is unexpired on the day the case is initiated. Additionally, if the employer enters into E-Verify that the employee provided a driver's license, driver's permit, or state-issued ID card as the document to establish identify on the Form I–9, then E-Verify will request that the employer enter the type of document presented, as well as the state of issuance and expiration date. The expiration date is then validated by E-Verify to ensure that an unexpired document was presented by the employee to the employer. If the document presented was issued by a state or jurisdiction participating in RIDE, then E-Verify also collects and verifies the document number as described below.

Form I–9 contains a field for the SSN, but the employee is not required to provide this number unless the employer is participating in E-Verify. All employers in the United States are required to use this form regardless of whether they are enrolled in E-Verify.

Processing Non-U.S. Citizens

For Non-U.S. Citizens, including immigrants, non-immigrants, and lawful permanent residents, the vast majority of queries are completed when E-Verify

verifies the name, SSN, and DOB against the SSA NUMIDENT System (71 FR 1796), followed by the name, DOB, and Form I–9 identity document information against certain DHS and MVA databases when the state or jurisdiction is participating in RIDE. The specific database against which the information will be verified depends on the document provided by the employee. For example, if the employee uses an Employment Authorization Document (EAD), the Alien Number (hereafter "A–Number") is queried against the USCIS Central Index System (CIS), and the EAD photograph, as described below against the USCIS Image Storage and Retrieval System (ISRS). If the employee is a non-immigrant, E-Verify queries the Arrival Departure Record (Form I–94) number against the United States Customs and Border Protection (CBP) Non Immigrant Information System (73 FR 77739) and Border Crossing Information System (73 FR 43457). If the employee provides a driver's license, driver's permit, or state-issued ID card and the issuing state or jurisdiction is a participant in RIDE, and an MOA exists between the state or jurisdiction and DHS USCIS to validate the information, then E-Verify verifies that document against the participating MVA's database. If SSA, DHS, and the state MVA database (if applicable) are able to verify the employee's employment eligibility, the employer receives an Employment Authorized (EA) notification. E-Verify generates a case verification number and the employer may either print and retain the Case Details page from E-Verify or write the case verification number on Form I–9.

If the automated query does not immediately result in an EA response from E-Verify, the employer receives Verification in Process response, which means that the query has been automatically sent to the USCIS status verifiers. The USCIS status verifiers have one day to verify the employee's employment eligibility by manually reviewing the information submitted by the employer against information in DHS, the U.S. Department of State (DoS), and SSA databases. USCIS status verifiers are trained to evaluate the information provided by the employee against the various DHS databases. This could not be done as an automated process because of the complexities of the various types of data. If the USCIS status verifiers are able to confirm employment eligibility with the information available to them, they indicate the response in E-Verify and the employer receives the EA notification.

If the USCIS status verifiers are unable to confirm employment eligibility, E-Verify displays a DHS Tentative Non-Confirmation (TNC) response and generates a TNC notice for the employer to print and give to the employee that explains that the employee has received a TNC without going into detail about specifically what caused the TNC. The notice also explains the employee's rights, including the right to contest the result with DHS. If the employee wishes to contest the TNC, he/she must notify his employer.The employer then indicates the employee's wish to contest the TNC in E-Verify, upon which E-Verify generates a Referral Letter. This letter instructs the employee that he has eight days to contact USCIS status verifiers to resolve the discrepancy. Once the employee contacts the USCIS status verifiers, the USCIS status verifiers attempt to resolve the discrepancy by either requesting that the employee submit copies of the employee's immigration documents or by researching a number of DHS or DoS databases to determine whether there is additional information pertaining to that individual that would confirm the employment eligibility status. To conduct these database searches, USCIS status verifiers use a Person Centric Query System (PCQS) to facilitate the information search. If the USCIS status verifier determines that the employee is eligible to work, the USCIS status verifier indicates this in E-Verify. The E-Verify system then notifies the employer that the employee is EA. If the USCIS status verifier determines that an employee is not eligible to work, the USCIS status verifier updates E-Verify with a Final Non-Confirmation (FNC) disposition and E-Verify notifies the employer of this resolution. At this point, the employer may legally terminate the individual's employment and the employer must update the system to acknowledge any action taken. If an employer retains an employee who has received FNC that he is not eligible to work, it must notify DHS that it will retain the employee. If the employer fails to notify DHS, the employer may be liable for failure to notify and knowingly employing an individual who is not eligible to work.

Records and Information From Department of Motor Vehicles for E-Verify (RIDE)

The RIDE process begins when an employer indicates in E-Verify that an employee has presented a List B document on the Form I–9 (*e.g.* driver's license, driver's permit, or valid ID card). E-Verify first prompts the employer for the document type (driver's license, driver's permit, or state-issued ID card) and state of issuance. If E-Verify determines that the state of issuance and the document type is one that can be validated for RIDE (per the MOA between the MVA and DHS USCIS), E-Verify prompts the employer for: Employee name, employee DOB, employee SSN, hire date, document number, and document expiration date as provided on Form I–9. If E-Verify cannot verify the information provided under RIDE because there is not an existing MOA, then E-Verify collects the same information with the exception of the document number, since the document will not be verified against an MVA database.

E-Verify determines if the expiration date of the driver's license, driver's permit, or state-issued ID card as entered by the employer indicates that the employee presented an unexpired document to the employer. If E-Verify determines that an expired document was presented, E-Verify prompts the employer to enter a document that was not expired on the date of hire.

Next, the SSA validation, which is a standard part of the current E-Verify process, begins. E-Verify sends the SSN, citizenship status, name, and DOB to SSA for validation. If SSA does not validate the case information, E-Verify issues a TNC at that point and no further transactions occur until the TNC is resolved with SSA.

Once the query successfully passes SSA validation, E-Verify sends relevant license information (DOB, document number) to the state MVA database. The MVA returns a portion of the MVA record relevant to that document to E-Verify. Due to differences in MVA databases, variations in data returned to E-Verify by participating MVAs may occur. A complete list of states and jurisdictions participating in RIDE and the documents which are being verified is available in Appendix A of the E-Verify PIA update which is publishing concurrently with this SORN and available at *http://www.dhs.gov/privacy.* E-Verify compares the MVA information to the information initially entered by the employer to determine if there is a match between the document number and DOB provided by the MVA database and the document number and DOB entered by the employer. The employer does not see the MVA record, and will only see the final response given by E-Verify either EA or TNC if there is no match.

E-Verify issues an EA response if it determines a match at this step of the process. The employer does not see any

additional driver's license or identity information from the MVA or E-Verify, only the resulting response of EA, or TNC if there is no match.

If the MVA cannot find a matching record or E-Verify cannot match the document number and DOB based on the record returned by the MVA, E-Verify instructs the employer to check and, if necessary, correct the document number and/or DOB fields and resubmit the information through E-Verify. E-Verify matches the record by document number and DOB only; these are the only fields that can be changed by the employer. There is no name matching in the RIDE process. If after the second attempt there is still no match, the employer receives notice that the employee was issued a DHS TNC.

As with any E-Verify TNC, the employer must share the result with the employee, who has the option of whether or not to contest. If the employee chooses to contest, the employer prints a referral letter, which provides directions to the employee on how to contest the TNC. This letter instructs the employee that he has eight days to contact a USCIS status verifier to resolve the discrepancy.

If a TNC is generated because of a RIDE mismatch and the individual chooses to contest the TNC, the employee must call a USCIS status verifier and fax in a copy of the document (*e.g.,* driver's license) provided to establish identity on Form I–9. USCIS status verifiers compare the faxed copy of the document with the information in the MVA's database via the PCQS. Status Verifiers use PCQS to conduct manual queries of databases for status verification; in this case, the MVA database of the issuing state or jurisdiction. As in other TNCs, the status verifier attempts to resolve the TNC within 24 hours. If the USCIS status verifier is unable to match the driver's license, the status verifier places the case in continuance and contacts the MVA to determine whether it is a true mismatch or an error in the MVA database. This process ensures that all contested TNCs receive a full examination against the MVA's records in order to avoid issuing a FNC because the MVA database was incorrect or because the document contained errors. Once the status verifier has researched the document, he enters a response that triggers an update to the case in E-Verify. E-Verify will display a response of EA or FNC to the employer depending on the resolution. If the employee chooses not to contest the TNC or does not contact a USCIS status verifier within eight Federal workdays, E-Verify automatically issues an FNC.

Photo Screening Tool

In addition to the normal verification process, if the employee has used certain DHS-issued documents, such as the Permanent Resident Card (Form I–551) or the Employment Authorization Card (Form I–766), or if the employee is a U.S. Citizen who used a U.S. passport for completing Form I–9, the E-Verify tool presents the photo on record for the applicable document to the employer. The DHS photos come from USCIS's ISRS database, and the passport photos come from a copy of the DoS passport data contained in TECS, the information technology system maintained by CBP. This feature is known as the Photo Screening Tool. The employer visually compares the photo presented by E-Verify with the photo on the employee's card. The two photos should be an exact match. (This is not a check between the individual and the photo on the card, since the employer compares the individual to their photo ID during the Form I–9 process.) The employer must then indicate in E-Verify whether the pictures match or not. Depending on the employer's input, this may result in an EA response, or a DHS TNC for the employee based on a photo mismatch, which the employee will need to resolve by contacting a USCIS status verifier. If the employer reports a mismatch that results in a TNC, the employee is notified that he needs to provide a photocopy of their document to a USCIS status verifier. The USCIS status verifier does various searches to try to confirm the information supplied by the employee. In cases where the USCIS status verifier cannot match the information because the employee is asserting that there is a mistake in the document, the employee is directed to their local USCIS Application Support Center for resolution.

E-Verify User Rules and Restrictions

E-Verify provides extensive guidance for the employer to operate the E-Verify program through the user manual and training. One of the requirements for using E-Verify is that the employer must only submit an E-Verify query after hiring an employee. Further, the employer must perform E-Verify queries for newly hired employees no later than the third business day after they start work for pay. These requirements help to prevent employers from misusing the system.

While E-Verify primarily uses the information it collects for verification of employment eligibility, the information may also be used for law enforcement (to prevent fraud and misuse of E-Verify, and to prevent discrimination and identity theft), program analysis, monitoring and compliance, program outreach, customer service, and prevention of fraud or discrimination. On a case-by-case basis, E-Verify may give law enforcement agencies extracts of information indicating potential fraud, discrimination, or other illegal activities. The USCIS Verification Division uses information contained in E-Verify for several purposes:

(1) Program management, which may include documentary repositories of business information, internal and external audits, congressional requests, and program reports;

(2) Data analysis for program improvement efforts and system enhancement planning, which may include conducting surveys, user interviews, responding to public comments received during rulemakings or from call center contacts which may make outgoing or receive incoming calls regarding E-Verify, including using information for testing purposes;

(3) Monitoring and compliance, as well as quality assurance efforts, which may include analysis of customer use, data quality, or possible fraud, discrimination or misuse or abuse of the E-Verify system. This may originate directly from E-Verify;

(4) Outreach activities to ensure adequate resources are available to current and prospective program participants, which may include call lists and other correspondence. USCIS may also permit designated agents and employers to use the E-Verify logo if they have agreed to certain licensing restrictions;

(5) Customer service enhancements to improve the user's experience while using E-Verify; and

(6) Activities in support of law enforcement to prevent fraud and misuse of E-Verify, and to prevent discrimination and identity theft.

This System of Records Notice is replacing the System of Records Notice previously published in the **Federal Register** on May 19, 2010 (75 FR 28035).

II. Privacy Act

The Privacy Act embodies fair information principles in a statutory framework governing the means by which the United States Government collects, maintains, uses, and disseminates individuals' records. The Privacy Act applies to information that is maintained in a "system of records." A "system of records" is a group of any records under the control of an agency for which information is retrieved by the name of an individual or by some identifying number, symbol, or other identifying particular assigned to the

individual. In the Privacy Act, an individual is defined to encompass U.S. citizens and lawful permanent residents. As a matter of policy, DHS extends administrative Privacy Act protections to all individuals where systems of records maintain information on U.S. citizens, lawful permanent residents, and visitors. Individuals may request access to their own records maintained in a system of records in the possession or under the control of DHS by complying with DHS Privacy Act regulations, 6 CFR part 5.

The Privacy Act requires each agency to publish in the **Federal Register** a description denoting the type and character of each system of records that the agency maintains, and the routine uses that are contained in each system in order to make agency record keeping practices transparent, to notify individuals regarding the uses to their records are put, and to assist individuals to more easily find such files within the agency. Below is the description of the DHS/USCIS—011 E-Verify Program System of Records.

In accordance with 5 U.S.C. 552a(r), DHS has provided a report of this system of records to the Office of Management and Budget and to Congress.

System of Records

Department of Homeland Security (DHS)/United States Citizenship and Immigration Service (USCIS)—011.

SYSTEM NAME:

Department of Homeland Security/United States Citizenship Immigration Services—011 E-Verify Program System of Records.

SECURITY CLASSIFICATION:

Unclassified, for official use only.

SYSTEM LOCATION:

Records are maintained in the Verification Information System (VIS) at the USCIS Headquarters in Washington, DC and field offices.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Categories of individuals covered by the E-Verify program include: employees, both U.S. Citizens and non-U.S. Citizens, whose employers have submitted to E-Verify their identification information; employers who enroll in E-Verify; designated agents who enroll in E-Verify; individuals employed or retained by employers or designated agents who have accounts to use E-Verify; Individuals who contact E-Verify with information on the use of E-Verify; individuals who provide their names and contact information to E-Verify for notification or contact purposes; USCIS employees and contractors who have access to E-Verify for operation, maintenance, monitoring, and compliance purposes including, USCIS status verifiers, managers, and administrators; and individuals who may have been victims of identity theft and have chosen to lock their SSN from further use in the E-Verify program.

CATEGORIES OF RECORDS IN THE SYSTEM:

Employment eligibility information entered into E-Verify by the E-Verify employer about the employee to be verified.

- All Employees:
  - Name (last, first, middle initial, maiden);
  - Date of Birth;
  - Social Security Number;
  - Date of Hire;
  - Three day hire date expiration:
    - Awaiting SSN;
    - Technical Problems;
    - Audit Revealed New Hire Was Not Run;
    - Federal Contractor With E-Verify Clause Verifying Existing Employees; and
    - Other.
  - Claimed Citizenship Status;
  - Type of identity document presented by employee to the employer during Form I–9 preparation process;
  - Expiration Date of identity document presented by employee to the employer during Form I–9 preparation process;
  - State or jurisdiction of issuance of identity document presented by the employee to the employer during the Form I–9 process when that document is a driver's license, driver's permit, or state-issued identification (ID) card;
  - Document number of identity document presented by the employee to the employer during the Form I–9 preparation process when that document is a driver's license, driver's permit, or state-issued ID issued by a state or jurisdiction participating in the Records and Information from Departments of Motor Vehicles for E-Verify (RIDE) program and where an Memorandum of Agreement (MOA) exists between the state or jurisdiction and DHS USCIS to verify the information about the document;
  - Photographs, if required by secondary verification;
  - Disposition data from the employer. The following descriptors are entered by the employer based on the action taken by the employer as a result of the employment verification information:
    - The employee continues to work for the employer after receiving and Employment Authorized (EA) result: employer selects this option based on receiving an EA response from E-Verify;
    - The employee continues to work for the employer after receiving a Final Non-Confirmation (FNC) result: employer selects this option based on the employee getting an FNC despite the employee contesting the Tentative Non-Confirmation (TNC) and the employer retains the employee;
    - The employee continues to work for the employer after receiving a No Show result: employer selects this option based on the employee getting a TNC but the employee did not try to resolve the issue with Social Security Administration (SSA) or DHS and the employer retains the employee;
    - The employee continues to work for the employer after choosing not to contest a TNC: employer selects this option when the employee does not contest the TNC but the employer retains the employee;
    - The employee was terminated by the employer of receiving a FNC result: employer selects this option when employee receives FNC and is terminated;
    - The employee was terminated by the employer for receiving a No Show result: employer selects this option when employee did not take an action to resolve and is terminated;
    - The employee was terminated by the employer for choosing not to contest a TNC: employer selects this option when employee does not contest the TNC and is terminated;
    - The employee voluntarily quit working for the employer: employer selects this option when employee voluntarily quits job without regard to E-Verify;
    - The employee was terminated by the employer for reasons other than E-Verify: employer selects this option when employee is terminated for reasons other than E-Verify;
    - The case is invalid because another case with the same data already exists: employer selects this option when the employer ran an invalid query because the information had already been submitted; and
    - The case is invalid because the data entered is incorrect: employer selects this option when the employer ran an invalid query because the information was incorrect.
- Non-U.S. Citizens:
  - A–Number; and
  - I–94 Number.
- Information about the Employer or Designated Agent:
  - Company Name;
  - Street Address;
  - Employer Identification Number;

- North American Industry Classification System (NAICS) Code;
- Number of Employees;
- Number of Sites;
- Parent Company or Corporate Company;
- Name of Company Point of Contact;
- Phone Number;
- Fax Number; and
- E–Mail Address.

• Information about the Individual Employer User of E-Verify: (*e.g.,* Human Resource employee conducting E-Verify queries)

- Last Name;
- First Name;
- Middle Initial;
- Phone Number;
- Fax Number;
- E-mail Address; and
- User ID.

• Employment Eligibility Information created by E-Verify:

- Case Verification Number;
- VIS Response:
- Employment Authorized;
- SSA TNC;
- DHS TNC;
- SSA Case in Continuance (in rare cases SSA needs more than 10 Federal government workdays to confirm employment eligibility);
- DHS Case in Continuance (in rare cases DHS needs more than 10 Federal government workdays to confirm employment eligibility);
- SSA FNC;
- DHS Verification in Process;
- DHS Employment Unauthorized;
- DHS No Show; and
- DHS FNC.
- Monitoring and Compliance Information created as part of E-Verify: The Verification Division monitors E-Verify to minimize and prevent misuse and fraud of the system. This monitoring information, and the accompanying compliance information, may in some cases be placed in the electronic or paper files that make up E-Verify.) The information may include:

- Analytic or other information derived from monitoring;
- Compliance activities, including information placed in the Compliance Tracking and Management System (CTMS);
- Complaint or hotline reports;
- Records of communication;
- Other employment and E-Verify related records, documents, or reports derived from compliance activities, especially in connection with determining the existence of fraud or discrimination in connection with the use of the E-Verify system; and
- Information derived from telephone calls, e-mails, letters, desk audits or site visits, as well as information from media reports or tips from law enforcement agencies.

• Information collected from Motor Vehicle Agencies (MVAs) and used to verify of the information from a driver's license, permit, or state issued ID card when those documents are presented as documents to establish identity by an employee to an employer during the E-Verify process, and when the jurisdiction under which the document was issued has established a MOA with DHS USCIS to allow verification of this information. Additional manual verification may be required if E-Verify is unable to verify the information submitted by the employer during the automated process. While each state MVA may collect different types of information, information provided to E-Verify may include the following:

- Last Name;
- First Name;
- State or Jurisdiction of Issuance;
- Document Type;
- Document Number;
- Date of Birth;
- Status Text;
- Status Description Text; and
- Expiration Date.
- Information used to verify employment eligibility. (E-Verify uses VIS as the transactional database to verify the information provided by the employee. VIS contains the E-Verify transaction information. If E-Verify is unable to verify employment eligibility through VIS, additional manual verification may be required. These automated and manual verifications may include the following databases.)
- Social Security Administration Numident System;
- USCIS Central Index System (CIS);
- CBP Nonimmigrant Information System (NIIS) and Border Crossing Information (BCI);
- USCIS Computer-Linked Application Information Management System Version 3 (CLAIMS 3);
- USCIS Computer-Linked Application Information Management System Version 4 (CLAIMS 4);
- USCIS Image Storage and Retrieval System (ISRS);
- ICE Student and Exchange Visitor Identification System (SEVIS);
- USCIS Reengineered Naturalization Applications Casework System (RNACS);
- USCIS Aliens Change of Address System (AR–11);
- USCIS National File Tracking System (NFTS);
- USCIS Microfilm Digitization Application System (MiDAS);
- USCIS Marriage Fraud Amendment System (MFAS);
- USCIS Citizenship and Immigration Services Centralized Operational Repository (CISCOR);
- Department of State Consular Consolidated Database (CCD);
- USCIS Enterprise Document Management System (EDMS);
- ICE ENFORCE Integrated Database (EID) Enforcement Alien Removal Module (EARM) Alien Number;
- USCIS Refugees, Asylum, and Parole System (RAPS);
- US–VISIT Arrival Departure Information System (ADIS); and
- Department of Justice Executive Office Immigration Review System (EOIR).

• These databases may contain some or all of the following information which will be incorporated into the E-Verify SORN as part of this verification process:

- Last Name;
- First Name;
- Middle Name;
- Maiden Name;
- Date of Birth;
- Age;
- Country of Birth;
- Country of Citizenship;
- Alien Number;
- Social Security Number;
- Citizenship Number;
- Receipt Number;
- Address;
- Previous Address;
- Phone Number;
- Nationality;
- Gender;
- Photograph;
- Date Entered United States;
- Class of Admission;
- File Control Office Code;
- Form I–94 Number;
- Provision of Law Cited for Employment Authorization;
- Office Code Where the Authorization Was Granted;
- Date Employment Authorization Decision Issued;
- Date Employment Authorization Begins;
- Date Employment Authorization Expires;
- Date Employment Authorization Denied;
- Confirmation of Employment Eligibility;
- TNC of Employment Eligibility and Justification; and
- FNC of Employment Eligibility.
- Status of Department of Justice Executive Office Immigration Review System (EOIR) Information, if in Proceedings.
- Date Alien's Status Changed;
- Class of Admission Code;
- Date Admitted Until;
- Port of Entry;

- Departure Date;
- Visa Number;
- Passport Number;
- Passport Information;
- Passport Card Number.
- Form Number, for example Form I–551 (Lawful Permanent Resident card) or Form I–766 (Employment Authorization Document);
- Expiration Date;
- Employment Authorization Card Information;
- Lawful Permanent Resident Card Information;
- Petitioner Internal Revenue Service Number;
- Class of Admission;
- Valid To Date;
- Student Status;
- Visa Code;
- Status Code;
- Status Change Date;
- Port of Entry Code;
- Non Citizen Entry Date;
- Program End Date.
- Naturalization Certificate Number;
- Naturalization Date and Place;
- Naturalization Information and Certificate;
- Naturalization Verification (Citizenship Certificate Identification ID);
- Naturalization Verification (Citizenship Naturalization Date/Time);
- Immigration Status (Immigration Status Code); and
- Federal Bureau of Investigation Number;
- Admission Number; and
- Petitioner Firm Name;
- Petitioner Tax Number;
- Date of Admission;
- Marital Status;
- Marriage Date and Place;
- Marriage Information and Certificate;
- Visa Control Number;
- FOIL Number;
- Class of Admission;
- Federal Bureau of Investigation Number;
- Case History;
- Alerts;
- Case Summary Comments;
- Case Category;
- Date of Encounter;
- Encounter Information;
- Case Actions & Decisions;
- Bonds;
- Current Status;
- Asylum Applicant Receipt Date;
- Airline and Flight Number;
- Country of Residence;
- City Where Boarded;
- City Where Visa was Issued;
- Date Visa Issued;
- Address While in United States;
- File Number;
- File Location; and
- Decision memoranda, investigatory reports and materials compiled for the purpose of enforcing immigration laws, exhibits, transcripts, and other case-related papers concerning aliens, alleged aliens or lawful permanent residents brought into the administrative adjudication process.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Public Law 104–208, dated September 30, 1996.

PURPOSE(S):

This system provides employment authorization information to employers participating in E-Verify. It may also be used to support monitoring and compliance activities for obtaining information in order to prevent the commission of fraud, discrimination, or other misuse or abuse of the E-Verify system, including violation of privacy laws or other illegal activity related to misuse of E-Verify, including:

- Investigating duplicate registrations by employers;
- Inappropriate registration by individuals posing as employers;
- Verifications that are not performed within the required time limits; and
- Cases referred by and between E-Verify and the Department of Justice Office of Special Counsel for Immigration-Related Unfair Employment Practices, or other law enforcement entities.

Additionally, the information in E-Verify may be used for program management and analysis, program outreach, customer service and preventing or deterring further use of stolen identities in E-Verify.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

In addition to those disclosures generally permitted under 5 U.S.C. 552a(b) of the Privacy Act, all or a portion of the records or information contained in this system may be disclosed outside DHS as a routine use pursuant to 5 U.S.C. 552a(b)(3) as follows:

A. To the Department of Justice (including United States Attorney Offices) or other Federal agency conducting litigation or in proceedings before any court, adjudicative or administrative body, when it is necessary to the litigation and one of the following is a party to the litigation or has an interest in such litigation:

1. DHS or any component thereof;

2. Any employee of DHS in his/her official capacity;

3. Any employee of DHS in his/her individual capacity where DOJ or DHS has agreed to represent the employee; or

4. The United States or any agency thereof, is a party to the litigation or has an interest in such litigation, and DHS determines that the records are both relevant and necessary to the litigation and the use of such records is compatible with the purpose for which DHS collected the records.

B. To a congressional office from the record of an individual in response to an inquiry from that congressional office made at the request of the individual to whom the record pertains.

C. To the National Archives and Records Administration or other Federal government agencies pursuant to records management inspections being conducted under the authority of 44 U.S.C. 2904 and 2906.

D. To an agency, organization, or individual for the purpose of performing audit or oversight operations as authorized by law, but only such information as is necessary and relevant to such audit or oversight function.

E. To appropriate agencies, entities, and persons when:

1. DHS suspects or has confirmed that the security or confidentiality of information in the system of records has been compromised;

2. The Department has determined that as a result of the suspected or confirmed compromise there is a risk of harm to economic or property interests, identity theft or fraud, or harm to the security or integrity of this system or other systems or programs (whether maintained by DHS or another agency or entity) or harm to the individual that rely upon the compromised information; and

3. The disclosure made to such agencies, entities, and persons is reasonably necessary to assist in connection with DHS's efforts to respond to the suspected or confirmed compromise and prevent, minimize, or remedy such harm.

F. To contractors and their agents, grantees, experts, consultants, and others performing or working on a contract, service, grant, cooperative agreement, or other assignment for DHS, when necessary to accomplish an agency function related to this system of records. Individuals provided information under this routine use are subject to the same Privacy Act requirements and limitations on disclosure as are applicable to DHS officers and employees.

G. To an appropriate Federal, State, Tribal, local, international, or foreign law enforcement agency or other appropriate authority charged with

investigating or prosecuting a violation or enforcing or implementing a law, rule, regulation, or order, where a record, either on its face or in conjunction with other information, indicates a violation or potential violation of the E-Verify program, which includes potential fraud, discrimination, or employment based identity theft and such disclosure is proper and consistent with the official duties of the person making the disclosure.

H. To employers participating in the E-Verify Program in order to verify the employment eligibility of their employees working in the United States.

I. To the American Association of Motor Vehicle Administrators Network and participating MVAs for the purpose of validating information from a driver's license, permit, or identification card issued by the Motor Vehicle Agency of states or jurisdictions who have signed a Memorandum of Agreement with DHS under the Records and Information from Departments of Motor Vehicles for E-Verify (RIDE) program.

J. To the DOJ, Civil Rights Division, for the purpose of responding to matters within the DOJ's jurisdiction of the E-Verify Program, especially with respect to discrimination.

K. To the news media and the public, with the approval of the Chief Privacy Officer in consultation with counsel, when there exists a legitimate public interest in the disclosure of the information or when disclosure is necessary to preserve confidence in the integrity of DHS or is necessary to demonstrate the accountability of DHS's officers, employees, or individuals covered by the system, except to the extent it is determined that release of the specific information in the context of a particular case would constitute an unwarranted invasion of personal privacy.

DISCLOSURE TO CONSUMER REPORTING AGENCIES:

None.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

Records in this system are stored electronically or on paper in secure facilities in a locked drawer behind a locked door. The records are stored on magnetic disc, tape, digital media, and CD–ROM.

RETRIEVABILITY:

Records may be retrieved by name, verification case number, Alien Number, I–94 Number, Receipt Number, Passport (U.S. or Foreign) Number, Driver's License, Permit, or State-Issued Identification Card Number, or SSN of the employee, employee user, or by the submitting company name.

SAFEGUARDS:

Records in this system are safeguarded in accordance with applicable rules and policies, including all applicable DHS automated systems security and access policies. Strict controls have been imposed to minimize the risk of compromising the information that is being stored. Access to the computer system containing the records in this system is limited to those individuals who have a need to know the information for the performance of their official duties and who have appropriate clearances or permissions.

RETENTION AND DISPOSAL:

The retention and disposal schedule, N1–566–08–7 is approved by the National Archives and Records Administration. Records collected in the process of enrolling in E-Verify and in verifying employment eligibility are stored and retained in E-Verify for ten (10) years, from the date of the completion of the last transaction unless the records are part of an on-going investigation in which case they may be retained until completion of the investigation. This period is based on the statute of limitations for most types of misuse or fraud possible using E-Verify (under 18 U.S.C. 3291, the statute of limitations for false statements or misuse regarding passports, citizenship, or naturalization documents).

SYSTEM MANAGER AND ADDRESS:

Chief, Verification Division, U.S. Citizenship and Immigration Services, Washington, DC 20528.

NOTIFICATION PROCEDURE:

Individuals seeking notification of and access to any record contained in this system of records, or seeking to contest its content, may submit a request in writing to the USCIS Verification Division FOIA Officer, whose contact information can be found at *http://www.dhs.gov/foia* under "contacts." If an individual believes more than one component maintains Privacy Act records concerning him or her the individual may submit the request to the Chief Privacy Officer and Chief Freedom of Information Act Officer, Department of Homeland Security, 245 Murray Drive, SW., Building 410, STOP–0655, Washington, DC 20528.

When seeking records about yourself from this system of records or any other Departmental system of records your request must conform with the Privacy Act regulations set forth in 6 CFR part 5. You must first verify your identity, meaning that you must provide your full name, current address and date and place of birth. You must sign your request, and your signature must either be notarized or submitted under 28 U.S.C. 1746, a law that permits statements to be made under penalty of perjury as a substitute for notarization. While no specific form is required, you may obtain forms for this purpose from the Chief Privacy Officer and Chief Freedom of Information Act Officer, *http://www.dhs.gov* or 1–866–431–0486. In addition you should provide the following:

- An explanation of why you believe the Department would have information on you;
- Identify which component(s) of the Department you believe may have the information about you;
- Specify when you believe the records would have been created;
- Provide any other information that will help the FOIA staff determine which DHS component agency may have responsive records; and
- If your request is seeking records pertaining to another living individual, you must include a statement from that individual certifying his/her agreement for you to access his/her records.

Without this bulleted information the component(s) may not be able to conduct an effective search, and your request may be denied due to lack of specificity or lack of compliance with applicable regulations.

RECORD ACCESS PROCEDURES:

See "Notification procedure" above.

CONTESTING RECORD PROCEDURES:

See "Notification procedure" above.

RECORD SOURCE CATEGORIES:

Records are obtained from several sources including: (A) Information collected from employers about their employees relating to employment eligibility verification; (B) Information collected from E-Verify users used to provide account access and monitoring; (C) Information collected from Federal and state databases as listed in the Category of Records section above; and (D) Information created by E-Verify, including its monitoring and compliance activities.

EXEMPTIONS CLAIMED FOR THE SYSTEM:

None.

Dated: April 25, 2011.

Mary Ellen Callahan,

Chief Privacy Officer, Department of Homeland Security.

[FR Doc. 2011–11291 Filed 5–6–11; 8:45 am]

BILLING CODE P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

[USCG–2011–0336]

Information Collection Requests to Office of Management and Budget; OMB Control Numbers: 1625–0077, 1625–0085 and 1625–0112

AGENCY: Coast Guard, DHS.

ACTION: Sixty-day notice requesting comments.

SUMMARY: In compliance with the Paperwork Reduction Act of 1995, the U.S. Coast Guard intends to submit Information Collection Requests (ICRs) to the Office of Management and Budget (OMB), Office of Information and Regulatory Affairs (OIRA), requesting an extension of its approval for the following collections of information: 1625–0077, Security Plans for Ports, Vessels, Facilities, and Outer Continental Shelf Facilities and Other Security-Related Requirements; 1625–0085, Streamlined Inspection Program; and 1625–0112, Enhanced Maritime Domain Awareness via Electronic Transmission of Vessel Transit Data. Our ICRs describe the information we seek to collect from the public. Before submitting these ICRs to OIRA, the Coast Guard is inviting comments as described below.

DATES: Comments must reach the Coast Guard on or before July 8, 2011.

ADDRESSES: You may submit comments identified by Coast Guard docket number [USCG–2011–0336] to the Docket Management Facility (DMF) at the U.S. Department of Transportation (DOT). To avoid duplicate submissions, please use only one of the following means:

(1) *Online: http://www.regulations.gov.*

(2) *Mail:* DMF (M–30), DOT, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590–0001.

(3) *Hand delivery:* Same as mail address above, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The telephone number is 202–366–9329.

(4) *Fax:* 202–493–2251. To ensure your comments are received in a timely manner, mark the fax, to attention Desk Officer for the Coast Guard.

The DMF maintains the public docket for this Notice. Comments and material received from the public, as well as documents mentioned in this Notice as being available in the docket, will become part of the docket and will be available for inspection or copying at room W12–140 on the West Building Ground Floor, 1200 New Jersey Avenue, SE, Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. You may also find the docket on the Internet at *http://www.regulations.gov*.

Copies of the ICRs are available through the docket on the Internet at *http://www.regulations.gov*. Additionally, copies are available from: COMMANDANT (CG–611), ATTN PAPERWORK REDUCTION ACT MANAGER, U.S. COAST GUARD, 2100 2ND ST., SW., STOP 7101, WASHINGTON, DC 20593–7101.

FOR FURTHER INFORMATION CONTACT: Contact Ms. Kenlinishia Tyler, Office of Information Management, telephone 202–475–3652, or fax 202–475–3929, for questions on these documents. Contact Ms. Renee V. Wright, Program Manager, Docket Operations, 202–366–9826, for questions on the docket.

SUPPLEMENTARY INFORMATION:

Public Participation and Request for Comments

This Notice relies on the authority of the Paperwork Reduction Act of 1995; 44 U.S.C. chapter 35, as amended. An ICR is an application to OIRA seeking the approval, extension, or renewal of a Coast Guard collection of information (Collection). The ICR contains information describing the Collection's purpose, the Collection's likely burden on the affected public, an explanation of the necessity of the Collection, and other important information describing the Collections. There is one ICR for each Collection.

The Coast Guard invites comments on whether these ICRs should be granted based on the Collections being necessary for the proper performance of Departmental functions. In particular, the Coast Guard would appreciate comments addressing: (1) The practical utility of the Collections; (2) the accuracy of the estimated burden of the Collections; (3) ways to enhance the quality, utility, and clarity of information subject to the Collections; and (4) ways to minimize the burden of the Collections on respondents, including the use of automated collection techniques or other forms of information technology. In response to your comments, we may revise these ICRs or decide not to seek approval for the Collections. We will consider all comments and material received during the comment period.

We encourage you to respond to this request by submitting comments and related materials. Comments must contain the OMB Control Number of the ICR and the docket number of this request, [USCG–2011–0336], and must be received by July 8, 2011. We will post all comments received, without change, to *http://www.regulations.gov*. They will include any personal information you provide. We have an agreement with DOT to use their DMF. Please see the "Privacy Act" paragraph below.

Submitting Comments

If you submit a comment, please include the docket number [USCG–2011–0336], indicate the specific section of the document to which each comment applies, providing a reason for each comment. You may submit your comments and material online (*via http://www.regulations.gov*), by fax, mail, or hand delivery, but please use only one of these means. If you submit a comment online via *http://www.regulations.gov,* it will be considered received by the Coast Guard when you successfully transmit the comment. If you fax, hand deliver, or mail your comment, it will be considered as having been received by the Coast Guard when it is received at the DMF. We recommend you include your name, mailing address, an e-mail address, or other contact information in the body of your document so that we can contact you if we have questions regarding your submission.

You may submit your comments and material by electronic means, mail, fax, or delivery to the DMF at the address under **ADDRESSES**; but please submit them by only one means. To submit your comment online, go to *http://www.regulations.gov,* and type "USCG–2011–0336" in the "Keyword" box. If you submit your comments by mail or hand delivery, submit them in an unbound format, no larger than 8½ by 11 inches, suitable for copying and electronic filing. If you submit comments by mail and would like to know that they reached the Facility, please enclose a stamped, self-addressed postcard or envelope. We will consider all comments and material received during the comment period and will address them accordingly.

Viewing comments and documents: To view comments, as well as documents mentioned in this Notice as being available in the docket, go to

http://www.regulations.gov, click on the "read comments" box, which will then become highlighted in blue. In the "Keyword" box insert "USCG–2011–0336" and click "Search." Click the "Open Docket Folder" in the "Actions" column. You may also visit the DMF in Room W12–140 on the ground floor of the DOT West Building, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

Privacy Act

Anyone can search the electronic form of comments received in dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, *etc.*). You may review a Privacy Act statement regarding Coast Guard public dockets in the January 17, 2008, issue of the **Federal Register** (73 FR 3316).

Information Collection Requests

1. *Title:* Security Plans for Ports, Vessels, Facilities, and Outer Continental Shelf Facilities and Other Security-Related Requirements.

OMB Control Number: 1625–0077.

Summary: This information collection is associated with the maritime security requirements mandated by the Maritime Transportation Security Act (MTSA) of 2002. Security assessments, security plans and other security-related requirements are found in Title 33 CFR chapter I, subchapter H, and 33 CFR Parts 120 and 128.

Need: This information is needed to determine if vessels and facilities are in compliance with certain security standards.

Forms: CG–6025, CG–6025A.

Respondents: Vessel and facility owners and operators.

Frequency: On occasion.

Burden Estimate: The estimated burden has decreased from 1,278,068 hours to 1,108,043 hours a year.

2. *Title:* Streamlined Inspection Program.

OMB Control Number: 1625–0085.

Summary: The Coast Guard established an optional Streamlined Inspection Program (SIP) to provide owners and operators of U.S. vessels an alternative method of complying with inspection requirements of the Coast Guard.

Need: Section 3306 of 46 U.S.C. authorizes the Coast Guard to prescribe regulations necessary to carry out the inspections of vessels required under 46 U.S.C. 3301 and 46 U.S.C. 3103. The Coast Guard relies on reports, documents, records of other persons and other methods that have been determined to be reliable to ensure compliance with vessels and seamen requirements under 46 U.S.C. subtitle II. The Streamlined Inspection Program regulations under 46 CFR part 8, subpart E, offer owners and operators of affected vessels an alternative to traditional Coast Guard inspection procedures. Owners and operators of vessels opting to participate in the program will maintain a vessel in compliance with a Company Action Plan (CAP) and Vessel Action Plan (VAP) and have their own personnel periodically perform many of the tests and examinations conducted by marine inspectors of the Coast Guard. The Coast Guard expects participating vessels will continuously meet a higher level of safety and readiness throughout the inspection cycle.

Forms: Not applicable.

Respondents: Owners and operators of vessels.

Frequency: On occasion. Application and plan development occur only once at enrollment. Updates and revisions are required to be made every two years and the Officer in Charge, Marine Inspection (OCMI) and the company will review the plans every five years.

Burden Estimate: The estimated burden has increased from 2,496 hours to 2,774 hours a year.

3. *Title:* Enhanced Maritime Domain Awareness via Electronic Transmission of Vessel Transit Data.

OMB Control Number: 1625–0112.

Summary: The Coast Guard collects, stores, and analyzes data transmitted by LRIT to enhance maritime domain awareness (MDA). Awareness and threat knowledge are critical for securing the maritime domain and the key to preventing adverse events. Domain awareness enables the early identification of potential threats and enhances appropriate responses, including interdiction at an optimal distance with capable prevention forces.

Need: To ensure port safety and security and to ensure the uninterrupted flow of commerce.

Forms: None.

Respondents: Owners or operators of certain vessels.

Frequency: On occasion.

Burden Estimate: The estimated burden has increased from 150 hours to 204 hours a year.

Dated: April 29, 2011.

R.E. Day,

Rear Admiral, U.S. Coast Guard, Assistant Commandant for Command, Control, Communications, Computers and Information Technology.

[FR Doc. 2011–11271 Filed 5–6–11; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–1971–DR; Docket ID FEMA–2011–0001]

Alabama; Amendment No. 4 to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster declaration for the State of Alabama (FEMA–1971–DR), **DATED** April 28, 2011, and related determinations.

DATED: *Effective Date:* May 1, 2011.

FOR FURTHER INFORMATION CONTACT: Peggy Miller, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472, (202) 646–3886.

SUPPLEMENTARY INFORMATION: The notice of a major disaster declaration for the State of Alabama is hereby amended to include the following areas among those areas determined to have been adversely affected by the event declared a major disaster by the President in his declaration of April 28, 2011.

Bibb, Blount, Cherokee, Choctaw, Fayette, Greene, Hale, Jackson, Limestone, Madison, and Washington Counties for Individual Assistance (already designated for debris removal and emergency protective measures [Categories A and B], including direct Federal assistance, under the Public Assistance program).

The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households In Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050, Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.

W. Craig Fugate,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2011–11287 Filed 5–6–11; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–1971–DR; Docket ID FEMA–2011–0001]

Alabama; Amendment No. 6 to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster declaration for the State of Alabama (FEMA–1971–DR), **DATED** April 28, 2011, and related determinations.

DATES: *Effective Date:* May 2, 2011.

FOR FURTHER INFORMATION CONTACT: Peggy Miller, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472, (202) 646–3886.

SUPPLEMENTARY INFORMATION: The notice of a major disaster declaration for the State of Alabama is hereby amended to include the following areas among those areas determined to have been adversely affected by the event declared a major disaster by the President in his declaration of April 28, 2011.

Chilton, Coosa, Shelby, Pickens, and Talladega Counties for Individual Assistance (already designated for debris removal and emergency protective measures [Categories A and B], including direct Federal assistance, under the Public Assistance program).

The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households In Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050, Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.

W. Craig Fugate,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2011–11288 Filed 5–6–11; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–1971–DR; Docket ID FEMA–2011–0001]

Alabama; Amendment No. 5 to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster declaration for the State of Alabama (FEMA–1971–DR), **DATED** April 28, 2011, and related determinations.

DATES: *Effective Date:* May 2, 2011.

FOR FURTHER INFORMATION CONTACT: Peggy Miller, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472, (202) 646–3886.

SUPPLEMENTARY INFORMATION: The notice of a major disaster declaration for the State of Alabama is hereby amended to include the following areas among those areas determined to have been adversely affected by the event declared a major disaster by the President in his declaration of April 28, 2011.

Colbert, Morgan, and Winston Counties for Individual Assistance (already designated for debris removal and emergency protective measures [Categories A and B], including direct Federal assistance, under the Public Assistance program).

The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households In Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050, Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.

W. Craig Fugate,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2011–11286 Filed 5–6–11; 8:45 am]

BILLING CODE 911–23–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–1973–DR; Docket ID FEMA–2011–0001]

Georgia; Amendment No. 2 to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster declaration for the State of Georgia (FEMA–1973–DR), **DATED** April 29, 2011, and related determinations.

DATES: *Effective Date:* May 1, 2011.

FOR FURTHER INFORMATION CONTACT: Peggy Miller, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472, (202) 646–3886.

SUPPLEMENTARY INFORMATION: The notice of a major disaster declaration for the State of Georgia is hereby amended to include the following areas among those areas determined to have been adversely affected by the event declared a major disaster by the President in his declaration of April 29, 2011.

Meriwether, Monroe, Morgan, and Rabun Counties for Individual Assistance (already designated for debris removal and emergency protective measures [Categories A and B], including direct Federal assistance, under the Public Assistance program).

The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households In Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050, Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.

W. Craig Fugate,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2011–11277 Filed 5–6–11; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–1973–DR; Docket ID FEMA–2011–0001]

Georgia; Amendment No. 3 to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster declaration for the State of Georgia (FEMA–1973–DR), dated April 29, 2011, and related determinations.

DATES: *Effective Date:* May 2, 2011.

FOR FURTHER INFORMATION CONTACT: Peggy Miller, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472, (202) 646–3886.

SUPPLEMENTARY INFORMATION: The notice of a major disaster declaration for the State of Georgia is hereby amended to include the following areas among those areas determined to have been adversely affected by the event declared a major disaster by the President in his declaration of April 29, 2011.

Gordon, Harris, Heard, and Lumpkin Counties for Individual Assistance.

The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households In Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050, Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.

W. Craig Fugate,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2011–11279 Filed 5–6–11; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–1971–DR; Docket ID FEMA–2011–0001]

Alabama; Amendment No. 1 to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster declaration for the State of Alabama (FEMA–1971–DR), **DATED** April 28, 2011, and related determinations.

DATES: *Effective Date:* April 29, 2011.

FOR FURTHER INFORMATION CONTACT: Peggy Miller, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472, (202) 646–3886.

SUPPLEMENTARY INFORMATION: The notice of a major disaster declaration for the State of Alabama is hereby amended to include the following areas among those areas determined to have been adversely affected by the event declared a major disaster by the President in his declaration of April 29, 2011.

Marengo and Sumter Counties for Individual Assistance (already designated for debris removal and emergency protective measures [Categories A and B], including direct Federal assistance, under the Public Assistance program).

The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households In Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050, Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.

W. Craig Fugate,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2011–11285 Filed 5–6–11; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–1962–DR; Docket ID FEMA–2011–0001]

New Mexico; Amendment No. 2 to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster declaration for the State of New Mexico (FEMA–1962–DR), **DATED** March 24, 2011, and related determinations.

DATES: *Effective Date:* April 28, 2011.

FOR FURTHER INFORMATION CONTACT: Peggy Miller, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472, (202) 646–3886.

SUPPLEMENTARY INFORMATION: The notice of a major disaster declaration for the State of New Mexico is hereby amended to include the following area among those areas determined to have been adversely affected by the event declared a major disaster by the President in his declaration of March 24, 2011.

The Pueblo of Acoma for Public Assistance.

The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households In Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050, Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.

W. Craig Fugate,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2011–11283 Filed 5–6–11; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Citizenship and Immigration Services

Agency Information Collection Activities: New Information Collection; Comment Request

ACTION: 30-day notice of information collection under review: Visa Processing Fee Payment; OMB control No. 1615–New.

The Department of Homeland Security, U.S. Citizenship and Immigration Services (USCIS) will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and clearance in accordance with the Paperwork Reduction Act of 1995. The information collection was previously published in the **Federal Register** on March 3, 2011, at 76 FR 11805, allowing for a 60-day public comment period. USCIS did not receive any comments.

The purpose of This notice is to allow an additional 30 days for public comments. Comments are encouraged and will be accepted until June 8, 2011. This process is conducted in accordance with 5 CFR 1320.10.

Written comments and/or suggestions regarding the item(s) contained in this notice, especially regarding the estimated public burden and associated response time, should be directed to the Department of Homeland Security (DHS), and to the Office of Management and Budget (OMB) USCIS Desk Officer. Comments may be submitted to: USCIS, Chief, Regulatory Products Division, Office of the Executive Secretariat, Clearance Officer, 20 Massachusetts Avenue, Washington, DC 20529–2020. Comments may also be submitted to DHS via facsimile to 202–272–0997 or via e-mail at *rfs.regs@dhs.gov,* and to the OMB USCIS Desk Officer via facsimile at 202–395–5806 or via e-mail at *oira_submission@omb.eop.gov.* When submitting comments by e-mail please make sure to add Visa Processing Fee Payment in the subject box. Written comments and suggestions from the public and affected agencies should address one or more of the following four points:

(1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agencies estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

Overview of This Information Collection

(1) *Type of Information Collection:* New information collection.

(2) *Title of the Form/Collection:* Visa Processing Fee Payment.

(3) *Agency form number, if any, and the applicable component of the Department of Homeland Security sponsoring the collection:* No Form Number; U.S. Citizenship and Immigration Services (USCIS).

(4) *Affected public who will be asked or required to respond, as well as a brief abstract: Primary: Individuals or households.* This information collection is necessary for USCIS to track payment of the visa processing fee and reconcile the payment received in the Federal Financial Management System (FFMS), and the applicant's file.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* 500,000 responses at 10 minutes (.166 hours) per response.

(6) *An estimate of the total public burden (in hours) associated with the collection:* 83,000 annual burden hours.

If you need a copy of the information collection instrument, please visit the Web site at: *http://www.regulations.gov.*

We may also be contacted at: USCIS, Regulatory Products Division, Office of the Executive Secretariat, Clearance Officer, 20 Massachusetts Avenue, NW., Washington, DC 20529–2020; Telephone 202–272–8377.

Dated: May 3, 2011.

Sunday Aigbe,

Chief, Regulatory Products Division, Office of the Executive Secretariat, U.S. Citizenship and Immigration Services, Department of Homeland Security.

[FR Doc. 2011–11166 Filed 5–6–11; 8:45 am]

BILLING CODE 9111–97–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Customs and Border Protection

Agency Information Collection Activities: Documentation Requirements for Articles Entered Under Various Special Tariff Treatment Provisions

AGENCY: U.S. Customs and Border Protection (CBP), Department of Homeland Security.

ACTION: 60-Day Notice and request for comments; Extension and revision of an existing collection of information: 1651–0067.

SUMMARY: As part of its continuing effort to reduce paperwork and respondent burden, CBP invites the general public and other Federal agencies to comment on an information collection requirement concerning: Documentation Requirements for Articles Entered Under Various Special Tariff Treatment Provisions. This request for comment is being made pursuant to the Paperwork Reduction Act of 1995 (Pub. L 104–13).

DATES: Written comments should be received on or before July 8, 2011, to be assured of consideration.

ADDRESSES: Direct all written comments to U.S. Customs and Border Protection, *Attn:* Tracey Denning, Regulations and Rulings, Office of International Trade, 799 9th Street, NW., 5th Floor, Washington, DC 20229–1177.

FOR FURTHER INFORMATION CONTACT: Requests for additional information should be directed to Tracey Denning, U.S. Customs and Border Protection, Regulations and Rulings, Office of International Trade, 799 9th Street, NW., 5th Floor, Washington, DC 20229–1177, at 202–325–0265.

SUPPLEMENTARY INFORMATION: CBP invites the general public and other Federal agencies to comment on proposed and/or continuing information collections pursuant to the Paperwork Reduction Act of 1995 (Pub. L. 104–13). The comments should address: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimates of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden including the use of automated collection techniques or the use of other forms of information technology; and (e) the annual costs burden to respondents or record keepers from the collection of

information (a total capital/startup costs and operations and maintenance costs). The comments that are submitted will be summarized and included in the CBP request for Office of Management and Budget (OMB) approval. All comments will become a matter of public record. In this document CBP is soliciting comments concerning the following information collection:

Title: Documentation Requirements for Articles Entered Under Various Special Tariff Treatment Provisions.

OMB Number: 1651–0067.

Form Number: None.

Abstract: U.S. Customs and Border Protection (CBP) is responsible for determining whether imported articles that are classified under Harmonized Tariff Schedule of the United States (HTSUS) subheadings 9801.00.10, 9802.00.20, 9802.00.25, 9802.00.40, 9802.00.50, and 9802.00.60 are entitled to duty-free or reduced duty treatment. In order to file under these HTSUS provisions, importers, or their agents, must have the declarations that are provided for in 19 CFR 10.1(a), 10.8(a), and 10.9(a) in their possession at the time of entry and submit them to CBP upon request. These declarations enable CBP to ascertain whether the statutory conditions and requirements of these HTSUS provisions have been satisfied. CBP proposes to add the declaration filed under HTSUS 9817.00.40 in accordance with 19 CFR 10.121 to this information collection.

Current Actions: CBP proposes to extend the expiration date of this information collection with a change to the burden hours resulting from updated estimates of the response time, and the addition of HTSUS 9817.00.40. There are no other changes to the information being collected.

Type of Review: Extension and Revision.

Affected Public: Businesses.

Estimated Number of Respondents: 19,455.

Estimated Number of Responses per Respondent: 3.

Estimated Number of Total Annual Responses: 58,335.

Estimated Time per Response: 1 minute.

Estimated Total Annual Burden Hours: 933.

Dated: May 3, 2011.

Tracey Denning,

Agency Clearance Officer, U.S. Customs and Border Protection.

[FR Doc. 2011–11246 Filed 5–6–11; 8:45 am]

BILLING CODE 9111–14–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5500–N–15]

Notice of Availability: Notice of Funding Availability (NOFA) for HUD's Fiscal Year (FY) 2011 Lead Technical Studies and Healthy Homes Technical Studies Programs

AGENCY: Office of the Chief of the Human Capital Officer, HUD.

ACTION: Notice.

SUMMARY: HUD announces the availability on its Web site of the applicant information, submission deadlines, funding criteria, and other requirements for HUD's FY2011 Lead Technical Studies and Healthy Homes Technical Studies Programs NOFA. Specifically, this NOFA announces the availability of approximately $2.5 million, of the total amount available, approximately $500,000 is for Lead Technical Studies and approximately $2 million is for Healthy Homes Technical Studies. The funding is made available under the Department of Defense and Full-Year Continuing Appropriations Act, 2011, Public Law 112–10, approved April 15, 2011.

Purpose: The purpose of these programs is to fund technical studies to improve existing methods for detecting and controlling lead-based paint and other housing-related health and safety hazards; to develop new methods to detect and control these hazards; and to improve our knowledge of lead-based paint and other housing-related health and safety hazards.

SUPPLEMENTARY INFORMATION: The NOFA providing information regarding the funds available, application process, funding criteria and eligibility requirements, application and instructions can be found using the Department of Housing and Urban Development agency link on the Grants.gov/Find Web site at *http://www.grants.gov/search/agency.do.* A link to the funding opportunity is also available on the HUD Web site at *http://portal.hud.gov/hudportal/HUD?src=/program_offices/administration/grants/fundsavail.* The link from the funds available page will take you to the agency link on Grants.gov.

The Catalogue of Federal Domestic Assistance (CFDA) number for the Lead Technical Studies Program is 14.902. The Catalogue of Federal Domestic Assistance (CFDA) number for the Healthy Homes Technical Studies Program is 14.906. Applications must be submitted electronically through Grants.gov.

FOR FURTHER INFORMATION CONTACT: Questions regarding specific program requirements should be directed to the agency contact identified in the program NOFA. Program staff will not be available to provide guidance on how to prepare the application. Questions regarding the 2011 General Section should be directed to the Office of Grants Management and Oversight at (202) 708–0667 or the NOFA Information Center at 800–HUD–8929 (toll free). Persons with hearing or speech impairments may access these numbers via TTY by calling the Federal Information Relay Service at 800–877–8339.

Dated: *May 3, 2011.*

Barbara S. Dorf,

Director, Office of Departmental Grants Management and Oversight, Office of the Chief of the Human Capital Officer.

[FR Doc. 2011–11156 Filed 5–6–11; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS–R5–R–2010–N284; BAC–4311–K9–S3]

Prime Hook National Wildlife Refuge, Sussex County, DE; Comprehensive Conservation Plan and Environmental Impact Statement

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of intent; request for comments.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), intend to prepare a comprehensive conservation plan (CCP) for Prime Hook National Wildlife Refuge (NWR) in Sussex County, Delaware. An environmental impact statement (EIS) evaluating effects of various CCP alternatives will also be prepared. We provide this notice in compliance with our CCP policy to advise other Federal and State agencies, Tribes, and the public of our intentions, and to obtain suggestions and information on the scope of issues to consider in the planning process. We are also requesting public comments. This notice also advises the public that we have reconsidered a 2005 notice, in which we announced our intention to develop an environmental assessment (EA) for the refuge. Comments already received in response to the previous notice will be considered during preparation of the subject CCP/EIS.

DATES: To ensure consideration, please send your written comments by June 23, 2011. We will announce opportunities

for public input in local news media throughout the CCP process.

ADDRESSES: Send your comments or requests for more information by any of the following methods.

E-mail: northeastplanning@fws.gov. Include "Prime Hook CCP" in the subject line of the message.

Fax: Attention: Thomas Bonetti, Planning Team Leader, at 413–253–8468.

U.S. Mail: Thomas Bonetti, Planning Team Leader, U.S. Fish and Wildlife Service, Northeast Regional Office, 300 Westgate Center Drive, Hadley, MA 01035.

In-Person Drop-off: You may drop off comments during regular business hours at Prime Hook NWR, 11978 Turkle Pond Road, Milton, DE 19968.

FOR FURTHER INFORMATION CONTACT: To obtain more information on the refuge, contact Michael Stroeh, Project Leader, Prime Hook NWR, 11978 Turkle Pond Road, Milton, DE 19968; phone: 302–653–9345; fax: 302–684–8504.

SUPPLEMENTARY INFORMATION:

Introduction

With this notice, we continue our process for developing a CCP for Prime Hook NWR in Sussex County, DE. This notice complies with our CCP policy, and the National Environmental Policy Act of 1969, as amended (NEPA) (42 U.S.C. 4321 *et seq.*), to (1) Advise other Federal and State agencies, Tribes, and the public of our intention to conduct detailed planning on this refuge, and (2) obtain suggestions and information on the scope of issues to consider in the environmental document and during development of the CCP.

Background

The CCP Process

The National Wildlife Refuge System Administration Act of 1966 (16 U.S.C. 668dd–668ee) (Administration Act), as amended by the National Wildlife Refuge System Improvement Act of 1997, requires us to develop a CCP for each national wildlife refuge. The purpose for developing a CCP is to provide refuge managers with a 15-year plan for achieving refuge purposes and contributing toward the mission of the National Wildlife Refuge System (NWRS), consistent with sound principles of fish and wildlife management, conservation, legal mandates, and our policies. In addition to outlining broad management direction on conserving wildlife and their habitats, CCPs identify wildlife-dependent recreational opportunities available to the public, including opportunities for hunting, fishing, wildlife observation and photography, and environmental education and interpretation. We will review and update the CCP at least every 15 years in accordance with the Administration Act.

Each unit of the NWRS was established for specific purposes. We use these purposes as the foundation for developing and prioritizing the management goals and objectives for each refuge within the NWRS mission, and to determine how the public can use each refuge. The planning process is a way for us and the public to evaluate management goals and objectives that will ensure the best possible approach to wildlife, plant, and habitat conservation, while providing for wildlife-dependent recreation opportunities that are compatible with each refuge's establishing purposes and the mission of the NWRS.

Our CCP process provides participation opportunities for Tribal, State, and local governments; agencies; organizations; and the public. At this time, we encourage input in the form of issues, concerns, ideas, and suggestions for the future management of Prime Hook NWR. We previously published a notice of intent on October 17, 2005 (70 FR 60365) stating we intended to prepare a CCP and EA for Prime Hook NWR. We held three public meetings in November 2005 in Milton, Dover, and Lewes, DE. All meetings were announced in local newspapers. One hundred and ten members of the public attended the meetings and provided comments. All comments we received on the EA will go forward into the EIS planning process. Based on the extent of public comments already received, and subsequent developments since scoping, we have determined that an EIS would be more appropriate than an EA to ensure that a full and fair discussion of all significant environmental impacts occurs, and to inform decision-makers and the public of the reasonable alternatives that would avoid or minimize adverse impacts and enhance the quality of the human environment.

We will conduct the environmental review of this project and develop an EIS in accordance with the requirements of NEPA, NEPA regulations (40 CFR parts 1500–1508), other appropriate Federal laws and regulations, and our policies and procedures for compliance with those laws and regulations.

Prime Hook National Wildlife Refuge

In 1963, Prime Hook NWR was established under the authority of the Migratory Bird Conservation Act (16 U.S.C. 715–715r) for use as an inviolate sanctuary, or any other management purpose, expressly for migratory birds. Farms and residences were once present on portions of what is now the refuge. Prime Hook NWR was established primarily to preserve coastal wetlands as wintering and breeding habitat for migratory waterfowl. The 10,133 acres of the refuge stretch along the west shore of Delaware Bay, 22 miles southeast of Dover, Delaware. Eighty percent of the refuge's vegetation cover types are characterized by tidal and freshwater creek drainages that discharge into the Delaware Bay and associated coastal marshes. The remaining 20 percent is composed of upland habitats. The land uses near the refuge are intensive agricultural and developed residential.

Scoping: Preliminary Issues, Concerns, and Opportunities

We have identified preliminary issues, concerns, and opportunities that we will address in the CCP. We have briefly summarized some of these issues below. During public scoping, we may identify additional issues.

Climate Change and Sea-Level Rise

A growing body of evidence indicates that accelerating climate change, associated with increasing global temperatures, is affecting water, land, and wildlife resources. Along our coasts, rising sea levels have begun to affect fish and wildlife habitats, including those used by waterfowl, wading birds, and shorebirds on our national wildlife refuges. Successful conservation strategies will require an understanding of climate change and the ability to predict how those changes will affect fish and wildlife at multiple scales. Overwash is the flow of water and sediment over the crest of the beach that does not directly return to the water body where it originated. It is a natural manifestation of rising sea levels, but also critical to maintaining healthy emergent wetlands in barrier island systems of estuaries like the Delaware and Chesapeake Bays.

Mosquito Control

Balancing the needs of wildlife and people is becoming more difficult as residential developments encroach upon wild areas and more visitors participate in wildlife-dependent recreational opportunities on the refuge. Providing quality habitat at sufficient quantities for an increasing number of species and individuals is challenging to wildlife managers and biologists. Mosquitoes are a part of the natural environment and a food source for a variety of wildlife. More importantly, insecticides, in particular adulticides

that are used to control mosquitoes, can have devastating impacts on insects, which are utilized by fish, amphibians, and migratory birds as important food sources. Prime Hook NWR has and will continue to work with the State's Mosquito Control Section while striving to protect the biological integrity, diversity, and environmental health of the refuge.

Cooperative Farming

Prime Hook NWR has an on-refuge cooperative farming program, which has a long history. However, the refuge has never tilled more than 870 acres in any year, and this farmed acreage has been reduced incrementally over the years. In 2006, the Delaware Audubon Society, Center for Food Safety, and Public Employees for Environmental Responsibility filed suit against the Service alleging the refuge's failure to comply with Federal laws and policies. The refuge ceased all farming operations in 2006. In 2009, the refuge was enjoined from farming and the planting of genetically modified organisms until the refuge completed compatibility determinations and environmental assessments dealing with the impacts.

Hunting

On the Delmarva Peninsula, hunting is a traditional outdoor pastime that is deeply rooted in American and Delaware heritage. Opportunities for public hunting are decreasing with increasing private land development. Refuge lands thus become increasingly important in the region as a place to engage in this activity. Hunting has and will continue to be an integral component of the public use program at the refuge. The U.S. Fish and Wildlife Service Manual (605 FW 2) states that hunting programs must provide quality experiences for the public, be compatible with the mission of the NWRS and the purposes of the refuge, and, to the extent practicable, be consistent with State fish and wildlife laws and regulations. In scoping for the CCP, we invite suggestions on how to improve the current hunting program.

Public Involvement

You may send comments anytime during the planning process by mail, e-mail, or fax (see **ADDRESSES**). There will be additional opportunities to provide public input once we have prepared a draft CCP. Comments already received under the previous notice will be considered during preparation of the subject CCP/EIS. The public's ideas and comments are an important part of the CCP process, and we invite public participation. The Service is looking for meaningful comments that will help determine the desired future conditions of the refuge and address the full range of refuge issues and opportunities.

Public Availability of Comments

Before including your address, phone number, e-mail address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Dated: January 28, 2011.

Kyla J. Hastie,

Acting Regional Director, U.S. Fish and Wildlife Service.

[FR Doc. 2011–11266 Filed 5–6–11; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

Grant Program To Assess, Evaluate and Promote Development of Tribal Energy and Mineral Resources

AGENCY: Bureau of Indian Affairs, Interior.

ACTION: Solicitation of proposals.

SUMMARY: The Energy and Mineral Development Program (EMDP) provides funding to Indian tribes with the mission goal of assessing, evaluating, and promoting energy and mineral resources on Indian trust lands for the economic benefit of Indian mineral owners. To achieve these goals, the Department of the Interior's Office of Indian Energy and Economic Development (IEED), through its Division of Energy and Mineral Development (DEMD) office, is soliciting proposals from tribes. The Department will use a competitive evaluation process to select several proposed projects to receive an award.

DATES: Submit grant proposals on or before June 23, 2011. We will not consider grant proposals received after this date.

ADDRESSES: E-mailing your proposal is highly recommended this year. You may e-mail your proposal to either Robert Anderson at *robert.anderson@bia.gov* or Amanda John at *amanda.john@bia.gov.* We will respond back to you via e-mail that we received your proposal and that it was readable. In the alternative, you may mail or hand-carry grant proposals to the Department of the Interior, Division of Energy and Mineral Development,

Attention: Energy and Mineral Development Program, 12136 W. Bayaud Avenue, Suite 300, Lakewood, CO 80228. Applicants should also inform local BIA offices by forwarding a copy of their proposal to their own BIA Agency and Regional offices.

FOR FURTHER INFORMATION CONTACT:

For questions about the EMDP program or submission process:

- Amanda John, *Tel:* (720) 407–0607; *e-mail: amanda.john@bia.gov;* or
- Robert Anderson, *Tel:* (720) 407–0602; *e-mail: robert.anderson@bia.gov.*

For Additional Copies of the Proposal Writing Guidelines Manual:

- Tahnee KillsCrow, *Tel:* (720) 407–0655; *e-mail: tahnee.killscrow@bia.gov;*

For technical questions about the commodity you wish to assess or develop, please contact the appropriate DEMD persons listed below:

- *Mineral Projects (Precious Metals, Sand and Gravel):* Lynne Carpenter, *Tel:* (720) 407–0605, *e-mail: lynne.carpenter@bia.gov,* or David Holmes, *Tel:* (720) 407–0609, *e-mail: david.holmes@bia.gov.*
- *Conventional Energy Projects (Oil, Natural Gas, Coal):* Bob Just, *Tel:* (720) 407–0611, *e-mail: robert.just@bia.gov.*
- *Renewable Energy Projects (Biomass, Wind, Solar):* Winter Jojola-Talburt, *Tel:* (720) 407–0668, *e-mail: winter.jojola-talburt@bia.gov.*
- *Geothermal Energy:* Bob Just, *Tel:* (720) 407–0611, *e-mail: robert.just@bia.gov.*

You may also find additional information on our Web site. Please see the "Information on BIA's Web site" portion of **SUPPLEMENTARY INFORMATION,** below.

SUPPLEMENTARY INFORMATION:

I. Proposal Writing Guidelines

A. Background

Section 103 of the Indian Self-Determination Act, Public Law 93–638,

as amended by Public Law 100–472 contains the contracting mechanism for energy and mineral development-funded programs.

The IEED, through the DEMD office located in Lakewood, Colorado, administers and manages the EMDP program. The objectives of this solicitation are to receive proposals for energy and mineral development projects in the areas of exploration, assessment, development, feasibility and market studies.

Energy includes conventional energy resources (such as oil, gas, coal, uranium, and coal bed gas) and renewable energy resources (such as wind, solar, biomass, hydro and geothermal). Mineral resources include industrial minerals (*e.g.,* sand, gravel), precious minerals (*e.g.,* gold, silver, platinum), base minerals (*e.g.,* lead, copper, zinc), and ferrous metal minerals (*e.g.,* iron, tungsten, chromium).

This year's selection criteria emphasize:

- Renewable energy projects;
- Construction minerals, such as sand and gravel; and
- Job creation and income for the tribal community.

Our goals in the grant program are to:

- Assist tribes to achieve economic benefits from their energy and mineral resources;
- Expand tribes' understanding of their undeveloped resource potential so that they can exploit or bring new energy and mineral resources; and
- Ensure that new resources are produced in an environmentally acceptable manner.

Each year DEMD usually receives more energy and mineral development applications than can be funded in that year. The DEMD has discretion for awarding funds and requires that the tribes compete for such funds on an annual basis. The DEMD has established ranking and paneling procedures with defined criteria for rating the merits of proposals to make the award of limited funds as fair and equitable as possible.

The EMDP program is funded under the non-recurring appropriation of the Bureau of Indian Affairs' (BIA) budget. Congress appropriates funds for EMDP funding on a year-to-year basis. Thus, while some projects may extend over several years, funding for successive years depends on each fiscal year's appropriations.

The information collection requirements contained in this notice have been reviewed and approved by the Office of Management and Budget (OMB) under the Paperwork Reduction Act, 44 U.S.C. 3504(h). The OMB control number is 1076–0174. The authorization expires on April 30, 2013. An agency may not sponsor, and you are not required to respond to, any information collection that does not display a currently valid OMB Control Number.

B. Items To Consider Before Preparing an Application for an Energy and Mineral Development Grant

1. Trust Land Status

The EMDP funding can only be made available to tribes whose lands are held in trust or restricted fee by the Federal government. Congress has appropriated these funds for the development of energy and mineral resources only on Indian trust or restricted fee lands.

2. Tribes' Compliance History

The DEMD will monitor all EMDP grants for statutory and regulatory compliance to assure that awarded funds are correctly applied to approved projects. Tribes that expend funds on unapproved functions may forfeit remaining funds in that proposal year, and possibly for any future EMDP funding. The DEMD may also conduct a review of prior award expenditures before making a decision on funding current year proposals, and may request explanation from tribes who have outstanding project funds from previous years.

3. BIA Sanction List

Tribes who are currently under BIA sanction at Level 2 or higher resulting from non-compliance with the Single Audit Act may be ineligible from being considered for an award. Tribes at Sanction Level 1 will be considered for funding.

4. Completion of Previous Energy and Mineral Development Projects

Generally, the DEMD will not support nor recommend additional funding for a new project until a previous year's project has been completed, documented and reviewed by the DEMD.

However delays sometime occur that are beyond the control of the tribe or their consultant. These situations will be taken into consideration when making decisions on new EMDP awards. Examples of events which cause delays include late delivery of funding awards to the tribal project, difficulty in finding appropriate contractors to perform project functions, permitting issues, and weather delays.

5. Multiple Projects

The DEMD will accept more than one application from a tribe for projects, even if the project concerns the same commodity. For example, the tribe may have a viable renewable energy resource, but needs to better define the resource with further exploration work or analysis. Concurrently the tribe also needs to evaluate the market place for selling their resource. In this situation two separate proposals can be submitted and DEMD will apply the same objective ranking criteria to each proposal, although EMDP budget levels may limit the full application of this guideline.

6. Multi-Year Projects

The DEMD cannot award multi-year funding for a project. Funding available for the EMDP is subject to annual appropriations by Congress and therefore DEMD can only consider single-year funded projects.

The EMDP projects requiring funding beyond one-year intervals should be submitted as single-year proposals with an explanation that the tribe expects additional time will be required to complete the project and will therefore be submitting applications in following years. The DEMD will make every effort to fund a tribe's project in following years although there is no absolute guarantee of EMDP awards being available for future years of a multi-year project due to the discretionary nature of EMDP award funding.

7. Use of Existing Data

The DEMD maintains a comprehensive set of tribal data and information and has spent considerable time and expense in collecting digital land grids, geographic information system (GIS) data and imagery data for many reservations. Well and production data, geophysical data (such as seismic data), geology and engineering data, are all stored at DEMD's offices. All of these data sets can be made available to tribes or their consultants to reduce the cost of their investigations.

Budget line items will not be allowed for data or products that reside at DEMD. The tribe or the tribe's consultant must first check with DEMD for availability of these data sets on the reservation they are investigating. If DEMD does not have a particular data set, then EMDP funds may be used to acquire such data.

When a proposal includes the acquisition of new data, the tribe should thoroughly search for preexisting data to ensure there is no duplication. If older data does exist, it may still have considerable value. Using today's data processing and interpretation techniques, older data may be updated

or improved, either by the DEMD or by the tribe's consultant.

8. Using Technical Services at DEMD

The DEMD has many in-house technical capabilities and services that the tribes may wish to use. All services provided by DEMD are without charge to the tribes. Tribes can obtain maximum benefit from energy and mineral development studies by first using DEMD's services, or by using DEMD services in conjunction with outside consultants.

Services available at DEMD include:

- Technical literature search of previous investigations and work performed in and around reservations using reference materials located nearby, such as the U.S. Geological Survey (USGS) library in Denver, Colorado, or the Colorado School of Mines library in Golden, Colorado;
- Well production history analysis, decline curve and economic analysis of data obtained through DEMD's in-house databases;
- Well log interpretation, including correlation of formation tops, identification of producing horizons, and generation of cross-sections;
- Technical mapping capabilities, using data from well log formation tops and seismic data;
- Contour mapping capabilities, including isopachs, calculated grids, color-fill plotting, and posting of surface features, wells, seismic lines and legal boundaries;
- Seismic data interpretation and data processing;
- Three dimensional modeling of mine plans;
- Economic analysis and modeling for energy and solid mineral projects; and
- Marketing studies.

9. What the Energy and Mineral Development Program Cannot Fund

As stated above, these funds are specifically for energy and mineral development project work only. *Examples of elements that cannot be funded include:*

- Establishing or operating a tribal office, and/or purchase of office equipment not specific to the assessment project. Tribal salaries may be included only if the personnel are directly involved in the project and only for the duration of the project;
- Indirect costs and overhead as defined by the Federal Acquisition Regulation (FAR);
- Purchase of equipment that is used to perform the EMDP project, such as computers, vehicles, field gear, *etc.* (however, the leasing of this type of equipment for the purpose of performing energy and mineral development is allowed);
- Purchasing and/or leasing of equipment for the development of energy and mineral resources. This would include such items as well drilling rigs, backhoes, bulldozers, cranes, trucks, etc;
- Drilling of wells for the sale of hydrocarbons, geothermal resources, other fluid and solid minerals (however, funds may be used for the drilling of exploration holes for testing, sampling, coring, or temperature surveys);
- Legal fees;
- Application fees associated with permitting;
- Research and development of unproved technologies;
- Training;
- Contracted negotiation fees;
- Purchase of data that is available through DEMD;
- Any other activities not authorized by the tribal resolution or by the award letter; and
- Environmental Impact Studies (EIS) or Environmental Assessment (EA) studies.

10. Who performs energy and mineral development studies?

The tribe determines who they wish to perform the energy and mineral development work, such as a consultant, a private company, or other sources described in the list below.

- A private company (although that company must not be competing for exploration or development rights on the tribe's lands);
- An experienced and qualified scientific consultant;
- A Federal government agency (such as USGS or the U.S. Department of Energy (DOE) or a State government agency (such as a State geological survey); and
- The Division of Energy and Mineral Development office, although in this case award funds would not be transferred to the tribe but would be obligated by DEMD.

There are no requirements or restrictions on how the tribe performs their contracting function for the consultant or company. The tribe is free to issue the contract through a sole source selection or through competitive bidding. This determination will depend on the tribe's own contracting policies and procedures.

C. How To Prepare an Application for Energy and Mineral Development Funding

Each tribe's application must meet the criteria in this notice. A complete energy and mineral development request must contain the following three components:

1. A current tribal resolution authorizing the proposed project;
2. A proposal describing the planned activities and deliverable products; and
3. A detailed budget estimate.

Any funding request that does not contain all of the mandatory components will be considered incomplete and will be returned to the tribe with an explanation. The tribe will then be allowed to correct all deficiencies and resubmit the proposal for consideration on or before the deadline.

This year there will be a page limit restriction on proposal components. However the applicant will be allowed (and encouraged) to make use of appendices: Brevity of the proposal's proposal and statement of work will assist reviewers and DEMD staff in dealing effectively with proposals. Therefore the project proposal, statement of work and description of deliverable products may not exceed 20 pages. Visual materials, including charts, graphs, maps, photographs and other pictorial presentations are included in the 20-page limitation.

However an application may use appendices for the following types of discussions:

- Use an appendix for the overview of a tribe's history; location, government structure, population makeup, etc.
- Use an appendix to document previous work that has been performed concerning this proposal, including any work that was done under a previous EMDP grant.
- Use an appendix to expand on particular technical technologies or methodologies that will assist DEMD reviewers to gain a better understanding of these methods.

A detailed description of each of the required components follows.

1. Mandatory Component 1: Tribal Resolution

The tribal resolution must be current, and must be signed. It must authorize tribal approval for an EMDP proposed project in the same fiscal year as that of the energy and mineral development proposal and must explicitly refer to the assessment proposal being submitted. *The tribal resolution must also include:*

(a) A description of the commodity or commodities to be studied;

(b) A statement that the tribe is willing to consider development of any potential energy or mineral resource discovered;

(c) A statement describing how the tribe prefers to have the energy or

mineral program conducted (*i.e.,* by DEMD in-house professional staff only, by DEMD staff in conjunction with tribal professional staff, by private contractors or consultants, or through other acceptable means).

(d) A statement that the tribe will consider public release of information obtained from the energy and mineral development study. (Public release is meant to include publications, a poster session, attending a property fair, or giving an oral presentation at industry or Federal meetings and conferences. It does *not* mean providing copies of the data or reports to any individual, private company or other government agency without express written permission from the tribal government.)

Note: Any information in the possession of DEMD or submitted to DEMD throughout the EMDP process, including the final energy and mineral development study, constitutes government records and may be subject to disclosure to third parties under the Freedom of Information Act (FOIA), 5 U.S.C. 552, and the Department of the Interior's FOIA regulations at 43 CFR part 2, unless a FOIA exemption or exception applies or other provisions of law protect the information. A tribe may, but is not required to, designate information it submits as confidential commercially or financially sensitive information, as applicable, in any submissions it makes throughout the EMDP process. If DEMD receives a FOIA request for this information, it will follow the procedures in 43 CFR part 2.

2. Mandatory Component 2: Energy and Mineral Development Proposal

The proposal should be well organized, contain as much detail as possible, yet be presented succinctly to allow a quick and thorough understanding of the proposal by the DEMD ranking team.

Many tribes utilize the services of a staff geoscientist or private consultant to prepare the technical part of the proposal. However, some tribes may not have these resources and therefore, are urged to seek DEMD's technical assistance in preparing their EMDP proposal. Tribes who want technical assistance from DEMD should make this request in writing to the address provided in the **ADDRESSES** section of this notice. The request should be made as early as possible to give DEMD time to provide the assistance.

The proposal should include the following sections:

(a) Overview and Technical Summary of the Project: Prepare a short summary overview of the proposal that is no longer than one page. *The summary should include the following:*

- Elements of the proposed study;
- Reasons why the proposed study is needed;
- Total requested funding;

(b) Project Objective and Technical Description, Scope of Work: Provide a technical description of the project area, if sufficient information exists. Give examples of a typical resource occurrence to be examined under the proposal, such as the oil or gas deposit, etc. If possible, include criteria applicable to these types of resource occurrences.

- *Multi-Phased Studies:* Explain whether this assessment request will begin a new study or continue a study that has already been partially completed. Also explain how long the study will last. [**Note:** DEMD cannot guarantee funding for a project from one fiscal year to the next.]
- *Known Energy/Mineral Resource:* If a known energy or mineral deposit exists or produces near the reservation, discuss the possible extension or trend of the deposit onto the reservation.
- *Existing Information:* Acknowledge any existing mineral exploration information and provide references. The proposed new study should not duplicate previous work.
- *Environmental or Cultural Sensitive Areas:* Describe and verify if the resources are located in an archeological, environmentally or culturally sensitive area of the reservation. The tribe must also assist DEMD with the Environmental Assessment phase of the proposed project.
- Describe why the tribe needs the proposed energy and mineral development. Discuss the short and long term benefits to the tribe.
- Describe the work being proposed, project goals and objectives expected to be achieved by the proposed project.
- Describe the location on the reservation where the work will be done. Include relevant page size maps and graphs.
- Provide a detailed description of the scope of work and justification of a particular method. For example, if a geochemical sampling survey is planned, an explanation might include the quantity of samples to be obtained, what type of sampling will be targeted, the soil horizons to be tested, general location of the projected sampling, how the samples are to be analyzed and why geochemistry was chosen as an exploration technique. Furnish similar types of explanations and details for geophysics, geologic mapping, core drilling, or any other type of assessment planned.

(c) Deliverable Products: Describe all deliverable products that the proposed assessment project will generate, including all technical data to be obtained during the study. Describe the types of maps to be generated and the proposed scales. Also discuss how these maps and cross-sections will help define the energy and mineral potential on the reservation. Discuss any planned status reports as well as the parameters of the final report.

(d) Resumes of Key Personnel: If the tribe is using a consultant service provide the resumes of key personnel who will be performing the project work. The resumes should provide information on each individual's expertise. If subcontractors are used, these should also be disclosed.

3. Mandatory Component 3: Detailed Budget Estimate

A detailed budget estimate is required for the funding level requested. The detail not only provides the tribe with an estimate of costs, but it also provides DEMD with the means of evaluating the cost-benefit of each project. This line-by-line budget must fully detail all projected and anticipated expenditures under the EMDP proposal. The ranking committee reviews each budget estimate to determine whether the budget is reasonable and can produce the results outlined under the proposal.

Each proposed project function should have a separate budget. The budget should break out contract and consulting fees, fieldwork, lab and testing fees, travel and all other relevant project expenses. Preparation of the budget portion of an EMDP proposal should be considered a top priority. EMDP proposals that include sound budget projections will receive a more favorable ranking over those proposals that fail to provide appropriate budget projections.

The budget page(s) should provide a comprehensive breakdown for those project line items that involve several components, or contain numerous sub-functions.

(a) Contracted Personnel Costs. This includes all contracted personnel and consultants, their respective positions and time (staff-hour) allocations for the proposed functions of a project.

- Personnel funded under the Public Law 93–638 Energy and Mineral Development Program (EMDP) must have documented professional qualifications necessary to perform the work. Position descriptions or resumes should be attached to the budget estimate.
- If a consultant is to be hired for a fixed fee, the consultant's expenses should be itemized as part of the project budget.

• Consultant fees must be accompanied by documentation that clearly identifies the qualifications of the proposed consultants, how the consultant(s) are to be used, and a line item breakdown of costs associated with each consultant activity.

(b) Travel Estimates. Estimates should be itemized by airfare, vehicle rental, lodging, and per diem, based on the current federal government per diem schedule.

(c) Data Collection and Analysis Costs. These costs should be itemized in sufficient detail for the reviewer to evaluate the charges. For example, break down drilling and sampling costs in relation to mobilization costs, footage rates, testing and lab analysis costs per core sample.

(d) Other Expenses. Include computer rental, report generation, drafting, and advertising costs for a proposed project.

D. Submission of Application in Digital Format

Submit the application, including the budget pages, in digital form. The DEMD will return proposals that are submitted without the digital components.

Acceptable formats are Microsoft Word and Adobe Acrobat PDF. Each file must be saved with a filename that clearly identifies the file being submitted. File name extensions must clearly indicate the software application used in preparing the documents (*e.g.,* doc, docx, .pdf). Documents that require an original signature, such as cover letters, tribal resolutions, and other letters of tribal authorization can be submitted in hard copy (paper) form.

The files can be copied to compact disk (CD or DVD) and mailed, although a more preferable method is to e-mail the complete application. The DEMD will immediately respond back that the application was received and was readable. The budget should be in table format which can be in either Microsoft Word or Microsoft Excel.

If you have any additional questions concerning the Energy and Mineral Development Program proposal submission process, please contact Amanda John at (720) 407–0672 or Robert Anderson at (720) 407–0602.

E. Application Evaluation and Administrative Information

1. Administrative Review

Upon receiving an application, DEMD will perform a preliminary review of the proposal to determine whether it contains the prescribed information, includes a tribal resolution, contains sufficient technical and scientific information to permit an evaluation, and does not duplicate or overlap previous or current funded EMDP projects.

DEMD staff may return an application that does not include all information and documentation required within this notice. During the review of a proposal, DEMD may request the submission of additional information.

2. Ranking Criteria

Proposals will be formally evaluated by a DEMD Review and Ranking Panel using the six criteria described below. Each criterion has a weight percent which is used to determine a final score.

(a) Resource Potential; Weight = 10%. If the resource is determined not to exist on the reservation, then the proposal will be rejected. The panel will base their scoring on both the information provided by the tribe and databases maintained by DEMD. It is critical that the tribe attempt to provide all pertinent information in their proposal in order to ensure that an accurate review of the proposal is accomplished. The reviewers are aware that many tribes have little energy or mineral resource data on reservation lands, and in some cases, resource data does not exist. However, geologic and historical mineral development data exist throughout most of the continental U.S. on lands surrounding Indian reservations.

Many times a producing energy or mineral deposit exists outside but near the reservation boundary. The geologic setting containing the resource may extend onto the reservation, regardless of the size of the reservation. This would suggest potential of finding similar resources on the reservation. In some cases, available data on non-reservation lands may allow for a scientifically acceptable projection of favorable trends for energy or mineral occurrences on adjacent Indian lands.

For renewable energy proposals, this factor applies to conditions favorable for the economic development of the renewable energy source being studied.

The types of questions that the DEMD ranking panel will be analyzing in their review include: Based on your own knowledge or investigations, does the resource exist on or adjacent to the reservation? Does the application adequately describe the existence of the resource being present on or near the reservation, providing ample supporting technical evidence to support this?

(b) Marketability of the Resource; Weight = 15%. Reviewers will base their scoring on both the short- and long-term market conditions of the resources. Reviewers are aware that marketability of an energy or mineral commodity depends upon existing and emerging market conditions. Industrial minerals such as aggregates, sand/gravel and gypsum are dependent on local and regional economic conditions.

Precious and base metal minerals such as gold, silver, lead, copper and zinc are usually more dependent upon international market conditions. Natural gas and coal bed methane production depends upon having relatively close access to a transmission pipeline, as does renewable energy to an electric transmission grid.

Coal and crude oil production, on the other hand, carry built-in transportation costs, making those resources more dependent on current and projected energy commodity rates. At any time, some commodities may have a strong sustained market while others experience a weak market environment, or even a market surge that may be only temporary.

Reviewers are aware of pitfalls surrounding long-term market forecasts of energy and mineral resources, so the proposal should address this element fully. Also, short-term forecasts may indicate an oversupply from both national and internationally developed properties, and therefore additional production may not be accommodated. Certain commodities such as electricity may be in high demand in some regional sectors, but the current state of the transmission infrastructure does not allow for additional kilowatts to be handled, thereby hindering a market opportunity.

On the other hand, the potential for improving markets may be suggested by market indicators. Examples of market indicators include price history, prices from the futures markets, rig count for oil and gas, and fundamental factors like supply shortages, political unrest in foreign markets, and changes in technology.

The types of questions that the DEMD ranking panel will be analyzing in their review include: Does the application describe an existing or potential market for the commodity in the area? Is the product suitable for the area or region? Does the tribe have a realistic plan to market this resource? Is the end product that the tribe wants to market commercially viable?

(c) Economic Benefits Produced by the Project; Weight = 25%. This year there will be greater emphasis on funding projects that would have an impact on tribal jobs and income. To receive a high score for this ranking criterion, the proposal should clearly state how the project would achieve this result. If the project indirectly creates economic

benefits, for example applying royalty income from oil and gas productions to create other tribal businesses, that would satisfy this criterion. Whatever the commodity being studied, the ultimate goal is to collect useful data and information that allows the tribe to stimulate development on their lands. This might occur with industry partners or the tribe may develop the resource themselves.

The types of questions that the DEMD ranking panel will be analyzing in their review include: Are the economic goals and objectives of the project explained in the proposal? Does the proposal quantify the economic benefits (*e.g.,* revenue, royalty income, number of jobs, *etc.*) that would result from completion of the project?

(d) Tribes' Willingness to Develop and Commitment to the Project; Weight = 20%: The tribe's willingness to consider developing any potential resource must be clearly stated in the proposal and the tribal resolution. Note that this is *not* a statement for mandatory development of any potential resource, but just that the tribe is willing to develop. The decision on whether to develop will always lie with the tribe. The willingness-to-develop statement should sufficiently explain how the tribe intends to accomplish this task. The DEMD will also evaluate willingness to develop based upon the tribe's willingness to release energy or mineral data to potential developers.

Concerning the tribe's commitment to the project, the tribe should explain how it will participate in the study, such as by appointing a designated lead and contact person (especially a person with some knowledge of the technical aspects of the projects, and direct contact with the tribe's natural resource department and tribal council), to be committed to the successful completion of the project.

If the tribe has a strategic plan for development, this should be discussed in the proposal. A strategic plan outlines objectives, goals, and methodology for creating sustainable tribal economic development. The proposal should also explain how the tribe's EMDP proposal fits within that strategic plan.

The types of questions that the DEMD ranking panel will be analyzing in their review include: Does the proposal explain how the tribe is committed to the project? Has the Tribe appointed a designated lead or contact person within the tribe to serve as the project administrator (project champion)? Does the Tribe have an existing strategic development plan and/or plan of action that includes the economic development of energy or mineral resources (plan of action could include: Establishment of an energy task force/committees, resolutions, energy office, etc.)? Is the willingness to develop the resource clearly stated in the Tribal Resolution (is the full council on board with development)? Has the proposal clearly described the tribe's willingness to develop? Is the Tribe willing to release non-proprietary data to potential developers or partners? Is the Tribe's current business environment conductive to development?

(e) Budget Completeness, Cost Reasonableness, Cost Realism and Detail; Weight = 15%: The submitted budget should be evaluated as to the reasonableness and appropriateness of the costs for each line item, and the relationship to achieving the project's stated goals and objectives.

The types of questions that the DEMD ranking panel will be analyzing in their review include: Does the budget comply with Mandatory Component 3 (Detail Budget Estimate) from the guidelines? Is the budget detailed enough to explain how funds are to be allocated? Are line item budget numbers appropriate and reasonable to complete the proposed tasks?

(f) Adequacy of the Technical Proposal and Statement of Work; Weight = 15%: The submitted application should address all of elements listed as Mandatory Component 2 in the guidelines from this **Federal Register** solicitation, and be technically clear to understand.

The types of questions that the DEMD ranking panel will be analyzing in their review include: Does the proposal address all of elements listed as Mandatory Component 2 in the guidelines from the **Federal Register** solicitation? Is the technical proposal clear to understand and adequately written? Are the techniques and methodologies being applied technically reasonable and follow best practices? Does the technical proposal adequately explain how the techniques and methods to be used in the project would meet the goals and objectives of the proposal?

3. Ranking of Proposals and Award Letters

The EMDP review committee will rank the energy and mineral development proposals using the selection criteria outlined in this section. DEMD will then forward the rated requests to the Director of the IEED (Director) for approval. Once approved, the Director will submit all proposals to the Assistant Secretary—Indian Affairs for concurrence and announcement of awards to those selected tribes, via written notice. Those tribes not receiving an award will also be notified immediately in writing.

F. When To Submit

The DEMD will accept applications at any time before the deadline stated in the **DATES** section of this notice, and will send a notification of receipt to the return address on the application package, along with a determination of whether or not the application is complete.

There have been situations where tribes are waiting on completion of a tribal resolution due to tribal council's meeting schedules. The DEMD will consider receiving a final signed tribal resolution after the deadline date, although the proposal itself must still be sent to DEMD by the deadline date. If a final tribal resolution is to be sent late, the tribe must still contact DEMD (telephone or e-mail is acceptable) to inform DEMD of this delay. The DEMD will make every effort to work with the tribe on extending the due date for the resolution, although DEMD expects to begin the review and ranking of proposals approximately five business days after the deadline date.

G. Where To Submit

Submit the energy and mineral development proposals to DEMD at the address listed in the **ADDRESSES** section of this notice. Applicants should also forward a copy of their proposal to their own BIA Agency and Regional offices.

A tribe may fax the cover letter and resolution for the proposal before the deadline, which will guarantee that the proposal will be considered as being received on time. However, DEMD asks that tribes or consultants do not send the entire proposal via fax, as this severely overloads DEMD's fax system.

The BIA Regional or Agency level offices receiving a tribe's submitted EMDP proposal do not have to forward it on to DEMD. It is meant to inform them of a tribe's intent to perform energy or mineral studies using EMDP funding. The BIA Regional or Agency offices are free to comment on the tribe's proposal, or to ask DEMD for other information.

H. Transfer of Funds

The IEED will transfer a tribe's EMDP award funds to the BIA Regional Office that serves that tribe, via a sub-allotment funding document coded for the tribe's EMDP project. The tribe should anticipate the transfer and be in contact with budget personnel at the Regional and Agency office levels. Tribes receiving EMDP awards must establish

a new 638 contract to complete the transfer process, or use an existing 638 contract, as applicable.

I. Reporting Requirements for Award Recipients

1. Quarterly Reporting Requirements

During the life of the EMDP project, quarterly written reports are to be submitted to the DEMD project monitor for the project. The beginning and ending quarter periods are to be based on the actual start date of the EMDP project. This date can be determined between DEMD's project monitor and the tribe.

The quarterly report can be a one- to two-page summary of events, accomplishments, problems and results that took place during the quarter. Quarterly reports are due 2 weeks after the end of a project's fiscal quarter.

2. Final Reporting Requirements

• *Delivery Schedules.* The tribe must deliver all products and data generated by the proposed assessment project to DEMD's office within 2 weeks after completion of the project.

• *Mandatory Requirement to Provide Reports and Data in Digital Form.* The DEMD maintains a repository for all energy and mineral data on Indian lands, much of it derived from these energy and mineral development reports. As EMDP projects produce reports with large amounts of raw and processed data, analyses and assays, DEMD requires that deliverable products be provided in digital format, along with printed hard copies.

Reports can be provided in either Microsoft Word or Adobe Acrobat PDF format. Spreadsheet data can be provided in Microsoft Excel, Microsoft Access, or Adobe PDF formats. All vector figures should be converted to PDF format. Raster images can be provided in PDF, JPEG, TIFF, or any of the Windows metafile formats.

• *Number of Copies.* When a tribe prepares a contract for energy and mineral development, it must describe the deliverable products and include a requirement that the products be prepared in standard format (see format description above). Each energy and mineral development contract will provide funding for a total of six printed and six digital copies to be distributed as follows:

(a) The tribe will receive two printed and two digital copies of the EMDP report.

(b) The DEMD requires four printed copies and four digital copies of the EMDP report. The DEMD will transmit one of these copies to the tribe's BIA Regional Office, and one copy to the tribe's BIA Agency Office. Two printed and two digital copies will then reside with DEMD. These copies should be forwarded to the DEMD offices in Lakewood, Colorado, to the attention of the "Energy and Mineral Development Program."

All products generated by EMDP studies belong to the tribe and cannot be released to the public without the tribe's written approval. Products include all reports and technical data obtained during the study such as geophysical data, geochemical analyses, core data, lithologic logs, assay data of samples tested, results of special tests, maps and cross sections, status reports, and the final report.

J. Requests for Technical Assistance

The DEMD staff may provide technical consultation (*i.e.,* work directly with tribal staff on a proposed project), provide support documentation and data, provide written language on specialized sections of the proposal, and suggest ways a tribe may obtain other assistance, such as from a company or consultant specializing in a particular area of expertise. However, the tribe is responsible for preparing the executive summary, justification, and scope of work for their proposal.

The tribe must notify DEMD in writing that they require assistance, and DEMD will then appoint staff to provide the requested assistance. The tribe's request must clearly specify the type of technical assistance desired.

Requests for technical assistance should be submitted well in advance of the proposal deadline established in the **DATES** section of this solicitation to allow DEMD staff time to provide the appropriate assistance. Tribes not seeking technical assistance should also attempt to submit their EMDP proposals well in advance of the deadline to allow DEMD staff time to review the proposals for possible deficiencies and allow time to contact the tribe with requests for revisions to the initial submission.

II. Information on BIA's Web Site

You may find additional information about the EMDP program from our Web site, such as sample proposals, frequently asked questions, and general information about the services the DEMD office and provide to tribes. To locate our web page, navigate to the Indian Affairs Web site at *http://www.bia.gov.* Along the top tabs, click on the tab "Who We Are". On that page you will find a heading "Our Organization Structure". Locate the "Indian Energy and Economic Development (IEED)" link and click on that. Under the "Spotlight" section there will be a new announcement titled "Energy and Mineral Tribal Grant Program (EMDP)". Clicking on that link will take you to the page containing the EMDP program information.

The full link to the same page is as follows: *http://www.bia.gov/WhoWeAre/ASIA/IEED/DEMD/TT/TF/index.htm.* Copy the above link address and paste it into the address box on your Internet browser program.

Dated: April 27, 2011.

Jodi Gillette,

Deputy Assistant Secretary, Indian Affairs.

[FR Doc. 2011–11196 Filed 5–6–11; 8:45 am]

BILLING CODE 4310–4M–P

DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

Rate Adjustments for Indian Irrigation Projects

AGENCY: Bureau of Indian Affairs, Interior.

ACTION: Notice of Rate Adjustments.

SUMMARY: The Bureau of Indian Affairs (BIA) owns, or has an interest in, irrigation projects located on or associated with various Indian reservations throughout the United States. We are required to establish irrigation assessment rates to recover the costs to administer, operate, maintain, and rehabilitate these projects. We are notifying you that we have adjusted the irrigation assessment rates at several of our irrigation projects and facilities to reflect current costs of administration, operation, maintenance, and rehabilitation.

DATES: *Effective Date:* The irrigation assessment rates shown in the tables as final are effective as of January 3, 2011.

FOR FURTHER INFORMATION CONTACT: For details about a particular BIA irrigation project or facility, please use the tables in the **SUPPLEMENTARY INFORMATION** section to contact the regional or local office where the project or facility is located.

SUPPLEMENTARY INFORMATION: A Notice of Proposed Rate Adjustment was published in the **Federal Register** on November 1, 2010 (75 FR 67095) to propose adjustments to the irrigation assessment rates at several BIA irrigation projects. The public and interested parties were provided an opportunity to submit written comments during the 60-day period that ended January 3, 2011.

Did the BIA defer or change any proposed rate increases?

Yes. The 2011 Operation and Maintenance (O&M) rate for the Riverton Valley Irrigation District of the Wind River Irrigation Project was proposed in the **Federal Register** at $17.00 per acre. After further review, BIA discovered that the 2011 O&M rate for Riverton Valley Irrigation District should have been at $16.00 per acre pursuant to the Memorandum of Agreement between the BIA and the Riverton Valley Irrigation District. Hence, this notice of rate adjustments reflects a 2011 O&M rate of $16.00 per acre for the Riverton Valley Irrigation District.

Did the BIA receive any comments on the proposed irrigation assessment rate adjustments?

Written comments were received related to the proposed rate adjustments for the San Carlos Irrigation Project and the Wapato Irrigation Project.

What issues were of concern to the commenters?

Commenters raised concerns specific to the San Carlos Irrigation Project on the proposed rates about the following issues: (1) The methodology used for O&M rate setting; and (2) the appropriateness of specific O&M budget items relating to undelivered orders, environmental compliance, staffing levels and salary charges for the Irrigation System Operators, the reserve fund, and deferred maintenance at Coolidge Dam.

Commenters raised concerns specific to the Wapato Irrigation Project on the proposed rates about the following issues: (1) The Yakama Nation's concern that "it is impossible to comment on the substance of the proposed increases without being provided the basic cost and acreage information that go into the determination of the rate"; and (2) the Nation's objection that the underlying O&M charges are inconsistent with the Nation's litigation position in the pending appeals.

The following comments are specific to the San Carlos Irrigation Project

Written comments relating to the proposed rate adjustment for the San Carlos Irrigation Project–Joint Works (Project) were received by letter dated December 28, 2010, from the San Carlos Irrigation and Drainage District (District).

The District raised several issues in its letter. The BIA's summary of the District's issues and the BIA's responses are provided below.

Comment: The BIA's methodology for setting the 2012 O&M assessment rate was unreasonable.

Response: The methodology used by the BIA to determine the 2012 O&M assessment rate was reasonable. Based on a review of historical income and expenditures, a budget of projected income and expenditures is developed approximately two years before the O&M assessments are collected and expenses are incurred. The BIA relies on financial reports generated by the Federal Finance System for reviewing past expenditures and projecting a future budget and expenditures. Procurement files and records maintained by the Project are also reviewed and considered. For example, with regard to development of the 2012 Project budget, the BIA reviewed: (1) The year-end reconciled income and expenditure information for 2009; (2) available income and expenditure information for 2010; (3) previous budget projections for 2011; and (4) other information relevant to potential future Project expenses, such as cost information for replacement of the Coolidge Dam cylinder gates.

The BIA provided the District with draft budget and supporting information, held budget fact-finding meetings between November 2009 and April 2010, and received feedback from the District. In addition, in accordance with BIA policy, the BIA held meetings with Project water users (including the District) to discuss O&M rates and maintenance needs.

Comment: A large sum of obligated funds are carried over from year-to-year as undelivered orders (UDOs). As a result, funds are collected twice to satisfy the same UDOs. Obligated funds should be de-obligated at the end of each fiscal year and made available to meet expenses in the following year.

Response: The BIA's management of UDOs complies with Federal procurement requirements and is otherwise reasonable. The BIA met with the District several times to explain the UDOs carried by the Project's budget and how the UDOs are tracked and accounted for in the Federal Financial System. Specifically, the BIA explained this issue during year-end budget reconciliation presentations made to Project stakeholders for Fiscal Years 2008, 2009, and 2010. The Project's UDOs relate mostly to contract work in progress for annual maintenance of Project wells and annual environmental compliance activities. These contracts are awarded and administered in accordance with Federal procurement processes. Future contracts for these activities will also be solicited and awarded by the BIA in compliance with Federal procurement requirements. When funds obligated to a contract are not fully expended during the period of the contract, the BIA de-obligates the unexpended funds and the funds become available to satisfy other Project financial obligations. The BIA disagrees with the District's assertion that this is an "unreasonable fiscal management practice." The BIA manages the funds within the approved Federal Financial System and Federal procurement processes. The BIA's management of the funds is transparent to Project water users, and the amount, purpose, and status of the funds are reported to Project water users on a regular basis.

Comment: The BIA should not use two ISOs to change gates and stoplogs. One ISO can perform these tasks and the additional ISO is an unnecessary expense.

Response: The BIA currently uses two Project ISOs to perform certain O&M tasks, rather than one, as an interim measure in response to the accidental deaths of two Project ISOs, one in 2006 and the other in 2010, when they fell into the Project's Pima Lateral and drowned. During the summer of 2010, the BIA Safety Office visited the Project to conduct a Safety and Occupational Health Program Evaluation and develop a safety plan for the Project. The plan should be completed in 2011. Until the plan is completed and specific recommendations are issued, the BIA will continue to use two ISOs for certain O&M activities. The BIA will re-evaluate this practice and implement appropriate measures once the plan is complete.

Comment: The salaries of Project ISOs are high considering their work assignments. The Joint Control Board assumed many of the duties previously held by Project ISOs. The pay for these positions should be reduced.

Response: The current Project ISOs are paid at current levels because they are on temporary detail from higher-paid positions. The BIA detailed two Power Division employees to the Irrigation Division to address the Project ISO issue noted in the previous response. These employees are heavy equipment operators and are paid at the prevailing wage scale for those positions while on detail to the Irrigation Division. The BIA detailed these employees to the Irrigation Division on a temporary basis, rather than immediately hiring new ISOs, because Project staff are in the midst of working with the BIA's Human Resources Office to reorganize the Irrigation Division and establish ISO positions at the GS 04/05 level. The BIA initiated this reorganization at the request of the

District and other Project water users. Once the reorganization is approved and the positions recruited and filled, the Project's Irrigation Division staff budget will change accordingly. The BIA anticipated this change in the proposed FY 2013 O&M budget shared with Project water users.

This reorganization initiative follows changes already made by the Project's Irrigation Division during calendar year 2009 in response to the Joint Control Board's assumption of maintenance duties on the Joint Works facilities. The Irrigation Division's organization chart no longer includes heavy equipment operators because the maintenance functions of these positions were assumed by the Joint Control Board. The BIA will adjust staffing levels further once the Project's water delivery facilities are fully automated. When this occurs, the BIA will re-evaluate the duties of the ISOs and adjust ISO wage levels so that salaries are commensurate with the skills, knowledge, and abilities required for delivering water using automated facilities.

Comment: The Project's contract for environmental and archaeological services should be terminated and these services should be procured competitively in the future. Entities applying for encroachment permits should be charged fees that will cover cost of necessary environmental and archaeological evaluations and permit processing.

Response: The BIA did not extend the environmental and archaeological services contract non-competitively. The BIA extended the performance deadline for the contract, but the scope of work has remained the same. The BIA is taking several steps to reduce costs associated with performing environmental compliance activities.

In some instances, the BIA develops its own environmental compliance work product in furtherance of O&M responsibilities (*e.g.,* the San Carlos Reservoir litigation initiated by the San Carlos Apache Tribe). The BIA also uses environmental documents produced by other agencies where possible. To further reduce costs, the BIA is discussing with Project water users other options for conducting environmental compliance activities. The options include hiring an environmental specialist for the Project, charging fees to proponents of activities that require Federal environmental compliance, continuing to solicit contracts for this service, or some combination of these options.

Environmental compliance activities associated with the Project's O&M responsibilities are funded through O&M assessments and collections from the District and from Federal appropriations on behalf of the Indian Works. The BIA is legally obligated to perform these compliance activities and they benefit Project users by ensuring that the environmental effects of Project activities are understood. The BIA is evaluating whether a fee schedule is appropriate for funding environmental compliance required for certain activities. Until this evaluation is complete, the BIA will continue to fund Federal environmental compliance activities from the Project O&M revenues as authorized by Congress.

Comment: The emergency reserve fund should be reduced.

Response: The Project's emergency reserve fund is within the range specified in the Emergency Reserve Fund Determination Guidelines in the August 2008 BIA National Irrigation Handbook. The BIA reduced the reserve fund from $800,000 to $400,000 following the transfer of certain maintenance responsibilities to the Joint Control Board. The BIA continues to be responsible for the maintenance and management of Project wells and Coolidge Dam. Replacement of a single well is estimated to cost between $250,000 and $300,000. The BIA believes that the reserve fund should be maintained as proposed and consistent with the guidelines so that it can cover the cost of replacing a single well and other miscellaneous contingencies.

Comment: The amount budgeted for replacement of the broken Coolidge Dam cylinder gates should be reduced. A single bulkhead gate would be sufficient and less expensive and should be used. The current cost estimate for the replacement of the gates exceeds the initial cost estimate and the BIA has not explained the reason for the increased cost.

Response: Replacing the cylinder gates at Coolidge Dam with a single bulkhead gate is not appropriate. Also, the initial cost estimate referenced by the District is out-of-date and was a preliminary estimate. Recent cost estimates developed by the Bureau of Reclamation to replace both cylinder gates with automated bulkhead gates are more accurate. Replacing the inoperable gates with automated gates provides the greatest security to Project water users. The BIA provided information on this matter to Project water users. Additionally, in response to concerns expressed by the District at the last two water user meetings, the BIA proposed to schedule technical work group meetings this summer with the interested water users to re-review all available technical and cost information relating to the cylinder gates, and to refine the planning schedule for replacement of the cylinder gates.

Using a single bulkhead gate to close both cylinder gates is inadvisable for several reasons: (1) The bulkhead gate may not fit in both gate towers because the towers likely do not have the same dimensions; (2) a crane capable of lifting the bulkhead gate may not be available locally—in an emergency situation significant damage could occur to Coolidge Dam while waiting for a suitable crane to be procured; (3) the single bulkhead gate could close only one conduit at a time; and (4) the road crossing the crest of the dam would need to be closed when the bulkhead gate is removed or installed.

Comment: The employment of additional ISOs and replacement of Coolidge Dam cylinder gates are deviations from the "approved budget." These deviations should not be made without documentation and consultation with the District.

Response: The budget shared by the BIA during the Fact Finding process is not binding on the BIA. The BIA must update its O&M budget regularly to reflect actual expenditures and unplanned contingencies. The O&M budget presented during the Fact Finding process is the BIA's best estimate of what it will cost to operate the Project. The budget cannot be expected to remain unchanged because it is prepared two years in advance of the fiscal year in which the Project performs the actual O&M work. The BIA provides the District with an update on the Project's budget at nearly every monthly District Board meeting, at regularly scheduled water user meetings, and upon specific request from the District.

The BIA provided the District adequate information regarding the O&M activities to which the District objects. The BIA provided the District and other stakeholders with detailed technical information and cost estimates for the cylinder gate replacement operation in 2006, and the BIA has continued to discuss this matter with stakeholders. More recently, in February 2011, the BIA hosted a site visit at Coolidge Dam at the request of water users to discuss the cylinder gate issue. The BIA's Regional Safety of Dams Officer answered questions posed by the water users during this site visit. Also, the BIA has discussed the ISO interim measure and associated budget implications with water users continually since 2006. The BIA understands that the District disagrees with the interim measure undertaken by the Project to address this issue. The

BIA believes it has provided the District sufficient information and documentation regarding these activities.

The Yakama Nation (Nation) raised the following comments. The BIA's response is provided immediately after each comment statement.

The following comments are specific to the Wapato Irrigation Project:

Comment: The Nation is concerned that "it is impossible to comment on the substance of the proposed increases without being provided the basic cost and acreage information that go into the determination of the rate."

Response: Following BIA policy, the Wapato Irrigation Project conducted two water user meetings for the 2010 irrigation season. Representatives attending the meetings included the Nation and non-Indian water users. The purpose of these meetings is to provide opportunity for attendees to ask the BIA questions as well as to discuss maintenance plans for the upcoming year, among other topics. In accordance with 25 CFR Part 171.500, Operation and Maintenance, the Wapato Irrigation Project calculates the annual operation and maintenance assessment rate by estimating the annual operation, maintenance and rehabilitation costs and then dividing by the total assessable acres within the Project.

Comment: The Nation objects that the underlying O&M charges are inconsistent with the Nation's litigation position in the pending appeals.

Response: The Nation, which is served by the Wapato Irrigation Project, has an administrative appeal regarding the BIA's charging irrigation O&M on trust lands. As a general matter, the BIA's position is that we have statutory authority to establish the rates provided for under this notice. Regarding this particular issue, it raises concerns currently on appeal and does not specifically target the rate change, so it will not be discussed further in this notice.

Does this notice affect me?

This notice affects you if you own or lease land within the assessable acreage of one of our irrigation projects, or if you have a carriage agreement with one of our irrigation projects.

Where can I get information on the regulatory and legal citations in this notice?

You can contact the appropriate office(s) stated in the tables for the irrigation project that serves you, or you can use the Internet site for the Government Printing Office at www.gpo.gov.

What authorizes you to issue this notice?

Our authority to issue this notice is vested in the Secretary of the Interior by 5 U.S.C. 301 and the Act of August 14, 1914 (38 Stat. 583; 25 U.S.C. 385). The Secretary has in turn delegated this authority to the Assistant Secretary—Indian Affairs under Part 209, Chapter 8.1A, of the Department of the Interior's Departmental Manual.

Who can I contact for further information?

The following tables are the regional and project/agency contacts for our irrigation projects and facilities:

Northwest Region Contacts	
Stanley Speaks, Regional Director Bureau of Indian Affairs, Northwest Regional Office, 911 NE. 11th Avenue, Portland, Oregon 97232–4169, Telephone: (503) 231–6702	
Project Name	Project/Agency Contacts
Fort Hall Irrigation Project	Dean Fox, Acting Superintendent Fort Hall Agency P.O. Box 220 Fort Hall, ID 83203–0220 Telephone: (208) 238–1992
Wapato Irrigation Project	Edwin Lewis, Project Administrator Wapato Irrigation Project P.O. Box 220 Wapato, WA 98951–0220 Telephone: (509) 877–3155
Rocky Mountain Region Contacts	
Ed Parisian, Regional Director, Bureau of Indian Affairs, Rocky Mountain Regional Office, 316 North 26th Street, Billings, Montana 59101, Telephone: (406) 247–7943	
Project Name	Agency/Project Contacts
Blackfeet Irrigation Project	Stephen Pollock, Superintendent Vacant, Irrigation Project Manager Box 880 Browning, MT 59417 Telephones: (406) 338–7544, Superintendent (406) 338–7519, Irrigation Project Manager
Crow Irrigation Project	Vianna Stewart, Superintendent Karl Helvik, Acting Irrigation Project Engineer P.O. Box 69 Crow Agency, MT 59022 Telephones: (406) 638–2672, Superintendent (406) 638–2863, Irrigation Project Manager
Fort Belknap	Cliff Hall, Superintendent

Irrigation Project	Vacant, Irrigation Project Manager (Project O&M contracted by the Tribes) R.R.1, Box 980 Harlem, MT 59526 Telephones: (406) 353–2901, Superintendent (406) 353–2905, Irrigation Project Manager
Fort Peck Irrigation Project	Florence White Eagle, Superintendent, PH: (406) 768–5312 P.O. Box 637 Poplar, MT 59255; Huber Wright, Acting Irrigation Manager, PH: (406) 653–1752 602 6th Avenue North Wolf Point, MT 59201
Wind River Irrigation Project	Ed Lone Fight, Superintendent Ray Nation, Acting Irrigation Project Manager P.O. Box 158 Fort Washakie, WY 82514 Telephones: (307) 332–7810, Superintendent (307) 332–2596, Irrigation Project Manager
Southwest Region Contacts	
William T. Walker, Regional Director, Bureau of Indian Affairs, Southwest Regional Office, 1001 Indian School Road, Albuquerque, New Mexico 87104, Telephone: (505) 563–3100	
Project Name	Project/Agency Contacts
Pine River Irrigation Project	John Waconda, Superintendent Reginald Howe, Supervisory Irrigation Systems Operator P.O. Box 315 Ignacio, CO 81137–0315 Telephones: (970) 563–4511, Superintendent (970) 563–9484, Supervisory Irrigation Systems Operator
Western Region Contacts	
Bryan Bowker, Regional Director, Bureau of Indian Affairs, Western Regional Office, 2600 N, Central Avenue, 4th Floor Mailroom Phoenix, Arizona 85004, Telephone: (602) 379–6600	
Project Name	Project/Agency Contacts
Colorado River Irrigation Project	Janice Staudte, Superintendent Ted Henry, Irrigation Project Manager 12124 1st Avenue Parker, AZ 85344 Telephone: (928) 669–7111
Duck Valley Irrigation Project	Joseph McDade, Superintendent 1555 Shoshone Circle Elko, NV 89801 Telephone: (775) 738–5165
Fort Yuma Irrigation Project	Irene Herder, Superintendent 256 South Second Avenue, Suite D Yuma, AZ 85364–2258 Telephone: (928) 782–1202
San Carlos Irrigation Project Joint Works	Ferris Begay, Acting Project Manager Clarence Begay, Irrigation Manager P.O. Box 250 Coolidge, AZ 85228 Telephone: (520) 723–6215
San Carlos Irrigation Project Indian Works	Cecilia Martinez, Superintendent Joe Revak, Supervisory General Engineer Pima Agency, Land Operations P.O. Box 8 Sacaton, AZ 85247 Telephone: (520) 562–3326 Telephone: (520) 562–3372
Uintah	Daniel Picard, Superintendent

Irrigation Project	Dale Thomas, Irrigation Manager P.O. Box 130 Fort Duchesne, UT 84026 Telephone: (435) 722–4300 Telephone: (435) 722–4341
Walker River Irrigation Project	Athena Brown, Superintendent 311 E. Washington Street Carson City, NV 89701 Telephone: (775) 887–3500

What irrigation assessments or charges are adjusted by this notice?

The rate table below contains the current rates for all irrigation projects where we recover costs of administering, operating, maintaining, and rehabilitating them. The table also contains the final rates for the 2011 season and subsequent years where applicable. An asterisk immediately following the name of the project notes where the 2011 rates are different from the 2010 rates.

Northwest Region Rate Table

Project name	Rate category	Final 2010 rate	Final 2011 rate
Fort Hall Irrigation Project *	Basic per acre	$40.50	$42.00
	Minimum Charge per tract	$30.00	$31.50
Fort Hall Irrigation Project—Minor Units *	Basic per acre	$21.00	$22.50
	Minimum Charge per tract	$30.00	$31.50
Fort Hall Irrigation Project—Michaud *	Basic per acre	$41.50	$43.00
	Pressure per acre	$58.00	$59.50
	Minimum Charge per tract	$30.00	$31.50
Wapato Irrigation Project—Toppenish/Simcoe Units *	Minimum Charge for per bill	$15.00	$17.00
	Basic per acre	$15.00	$17.00
Wapato Irrigation Project—Ahtanum Units *	Minimum Charge per bill	$15.00	$17.00
	Basic per acre	$15.00	$17.00
Wapato Irrigation Project Wapato/Satus Unit *	Minimum Charge for per bill “A” Basic per acre	$58.00 $58.00	$63.00 $63.00
	“B” Basic per acre	$68.00	$70.00
Wapato Irrigation Project—Additional Works *	Minimum Charge per bill	$63.00	$67.00
	Basic per acre	$63.00	$67.00
Wapato Irrigation Project Water Rental *	Minimum Charge	$70.00	$72.00
	Basic per acre	$70.00	$72.00

Rocky Mountain Region Rate Table

Project name	Rate category	Final 2010 rate	Final 2011 rate
Blackfeet Irrigation Project	Basic-per acre	$19.00	$19.00
Crow Irrigation Project—Willow Creek O&M (includes Agency, Lodge Grass #1, Lodge Grass #2, Reno, Upper Little Horn, and Forty Mile Units).	Basic-per acre	$22.80	$22.80
Crow Irrigation Project—All Others (includes Bighorn, Soap Creek, and Pryor Units).	Basic-per acre	$22.50	$22.50
Crow Irrigation Two Leggins Drainage District	Basic-per acre	$2.00	$2.00
Fort Belknap Irrigation Project	Basic-per acre	$14.75	$14.75
Fort Peck Irrigation Project	Basic-per acre	$24.70	$24.70

Wind River Irrigation Project	Basic-per acre	$20.00	$20.00
Wind River Irrigation Project—LeClair District* (see Noten #1).	Basic-per acre	$26.00	$21.00
Wind River Irrigation Project—CrowHeart Unit	Basic-per acre	$14.00	$14.00
Wind River Irrigation Project—Riverton Valley Irrigation District.	Basic-per acre		$16.00

Southwest Region Rate Table

Project name	Rate category	Final 2010 rate	Final 2011 rate
Pine River Irrigation Project	Minimum Charge per tract	$50.00	$50.00
	Basic-per acre	$15.00	$15.00

Western Region Rate Table

Project name	Rate category	Final 2010 rate	Final 2011 rate	Proposed 2012 rate
Colorado River Irrigation Project*.	Basic per acre up to 5.75 acre-feet	$52.50	$54.00	To be determined.
	Excess Water per acre-foot over 5.75 acre-feet.	$17.00	$17.00	
Duck Valley Irrigation Project	Basic per acre	$5.30	$5.30	
Fort Yuma Irrigation Project (See Note #2)	Basic per acre up to 5.0 acre-feet	$86.00	$86.00	
	Excess Water per acre-foot over 5.0 acre-feet.	$14.00	$14.00	
	Basic per acre up to 5.0 acre-feet (Ranch 5).	$86.00	$86.00	
San Carlos Irrigation Project (Joint Works)*. (See Note #3)	Basic per acre	$21.00	$25.00	$30.00
San Carlos Irrigation Project (Indian Works). (See Note #4)	Basic per acre	$57.00	$68.00	To be determined
Uintah Irrigation Project	Basic per acre	$15.00	$15.00	
	Minimum Bill	$25.00	$25.00	
Walker River Irrigation Project*	Indian per acre	$19.00	$22.00	
	non-Indian per acre	$19.00	$22.00	

* Notes irrigation projects where rates have been adjusted.

Note #1—Upon further budget review and subsequent meetings with the water users, BIA revised the O&M rate to $26.00 per acre for FY 2010 versus the $27.00 per acre that was published in the **Federal Register** on May 26, 2010 (Vol. 75, No. 101, page 29578).

Note #2—The O&M rate for the Fort Yuma Irrigation Project has two components. The first component is the O&M rate established by the Bureau of Reclamation (BOR), the owner and operator of the Project. The 2011 BOR rate remains unchanged at $79.00/acre. The second component is for the O&M rate established by BIA to cover administrative costs including billing and collections for the Project. The 2011 BIA rate remains unchanged at $7.00/acre. The rates shown include the 2011 Reclamation rate and the 2011 BIA rate.

Note #3—This notice establishes the final rate for the SCIP–Joint Works for FY 2012. The proposed rate for FY 2012 was published in the **Federal Register** on November 1, 2011 (Vol. 75, No. 210, page 67095). The 2011 rate was established by final notice in the **Federal Register** on August 11, 2009 (Vol. 74 No. 153, page 40227).

Note #4—The 2011 O&M rate for the San Carlos Irrigation Project—Indian Works has three components. The first component is the O&M rate established by the San Carlos Irrigation Project—Indian Works, the owner and operator of the Project; this rate is proposed to be $36.00 per acre. The second component is for the O&M rate established by the San Carlos Irrigation Project—Joint Works and is determined to be $25.00 per acre. The third component is the O&M rate established by the San Carlos Irrigation Project Joint Control Board and is proposed to be $7 per acre.

Consultation and Coordination With Tribal Governments (Executive Order 13175)

To fulfill its consultation responsibility to Tribes and Tribal organizations, the BIA communicates, coordinates, and consults on a continuing basis with these entities on issues related to water delivery, water availability, and costs of administration, operation, maintenance, and rehabilitation of projects that concern them. This is accomplished at the individual irrigation project by Project, Agency, and Regional representatives, as appropriate, in accordance with local protocol and procedures. This notice is one component of our overall coordination and consultation process to provide notice to these entities when we adjust irrigation assessment rates.

Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use (Executive Order 13211)

The rate adjustments will have no adverse effects on energy supply, distribution, or use (including a shortfall in supply, price increases, and increase use of foreign supplies) as this rate adjustment is implemented. This is a notice for rate adjustments at BIA-owned and operated irrigation projects, except for the Fort Yuma Irrigation Project. The Fort Yuma Irrigation Project is owned and operated by the Bureau of Reclamation with a portion serving the Fort Yuma Reservation.

Regulatory Planning and Review (Executive Order 12866)

These rate adjustments are not a significant regulatory action and do not need to be reviewed by the Office of Management and Budget under Executive Order 12866.

Regulatory Flexibility Act

These rate adjustments are not a rule for the purposes of the Regulatory Flexibility Act because they establish "a rule of particular applicability relating to rates." 5 U.S.C. 601(2).

Unfunded Mandates Reform Act of 1995

These rate adjustments do not impose an unfunded mandate on State, local, or Tribal governments in the aggregate, or on the private sector, of more than $130 million per year. The rule does not have a significant or unique effect on State, local, or Tribal governments or the private sector. Therefore, the Department of the Interior (Department) is not required to prepare a statement containing the information required by the Unfunded Mandates Reform Act (2 U.S.C. 1531 *et seq.*).

Takings (Executive Order 12630)

The Department has determined that these rate adjustments do not have significant "takings" implications. The rate adjustments do not deprive the public, state, or local governments of rights or property.

Federalism (Executive Order 13132)

The Department has determined that these rate adjustments do not have significant Federalism effects because they will not affect the States, the relationship between the national government and the States, or the distribution of power and responsibilities among various levels of government.

Civil Justice Reform (Executive Order 12988)

In issuing this rule, the Department has taken the necessary steps to eliminate drafting errors and ambiguity, minimize potential litigation, and provide a clear legal standard for affected conduct, as required by section 3 of Executive Order 12988.

Paperwork Reduction Act of 1995

These rate adjustments do not affect the collections of information which have been approved by the Office of Information and Regulatory Affairs, Office of Management and Budget, under the Paperwork Reduction Act of 1995. The OMB Control Number is 1076–0141 and expires December 31, 2012.

National Environmental Policy Act

The Department has determined that these rate adjustments do not constitute a major Federal action significantly affecting the quality of the human environment and that no detailed statement is required under the National Environmental Policy Act of 1969 (42 U.S.C. 4321–4370(d)).

Data Quality Act

In developing this notice, we did not conduct or use a study, experiment, or survey requiring peer review under the Information Quality Act (Pub. L. 106–554).

Dated: April 27, 2011.

Jodi Gillette,

Deputy Assistant Secretary—Indian Affairs.

[FR Doc. 2011–11165 Filed 5–6–11; 8:45 am]

BILLING CODE 4310–W7–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLNM940000 L1420000.BJ0000]

Notice of Filing of Plats of Survey, New Mexico

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of filing of Plats of Survey.

SUMMARY: The plats of survey described below are scheduled to be officially filed in the New Mexico State Office, Bureau of Land Management, Santa Fe, New Mexico, thirty (30) calendar days from the date of this publication.

SUPPLEMENTARY INFORMATION:

New Mexico Principal Meridian, New Mexico (NM)

The plat, representing the dependent resurvey and survey, in Township 22 South, Range 2 East, of the New Mexico Principal Meridian, accepted March 15, 2011, for Group 1116 NM.

The plat, representing the dependent resurvey and survey, in Township 4 South, Range 1 West, of the New Mexico Principal Meridian, accepted March 16, 2011, for Group 1108 NM.

The plat, in five sheets, representing the dependent resurvey and survey, in Township 14 North, Range 20 West, of the New Mexico Principal Meridian, accepted April 19, 2011, for Group 1099 NM.

The supplemental plat, for Township 29 North, Range 13 East, of the New Mexico Principal Meridian accepted March 23, 2011.

Indian Meridian, Oklahoma (OK)

The plat, representing the dependent resurvey and survey in Township 22 North, Range 21 East, of the Indian Meridian, accepted March 22, 2011, for Group 193 OK.

Sixth Principal Meridian, Kansas (KS)

The plat, representing the dependent resurvey and survey in Township 4 South, Range 15 East, of the Sixth Principal Meridian, accepted April 7, 2011, for Group 35 KS.

The plat, representing the dependent resurvey and survey in Township 7 South, Range 14 East, of the Sixth Principal Meridian, accepted March 30, 2011, for Group 34 KS.

FOR FURTHER INFORMATION CONTACT: These plats will be available for inspection in the New Mexico State Office, Bureau of Land Management, 301 Dinosaur Trail, Santa Fe, New Mexico. Copies may be obtained from this office upon payment. Contact

Marcella Montoya at 505–954–2097, or by e-mail at *Marcella_Montoya@nm.blm.gov,* for assistance.

Persons who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 to contact the above individual during normal business hours.

These plats are to be scheduled for official filing 30 days from the notice of publication in the **Federal Register**, as provided for in the BLM Manual Section 2097—Opening Orders. Notice from this office will be provided as to the date of said publication. If a protest against a survey, in accordance with 43 CFR 4.450–2, of the above plats is received prior to the date of official filing, the filing will be stayed pending consideration of the protest.

A plat will not be officially filed until the day after all protests have been dismissed and become final or appeals from the dismissal affirmed.

A person or party who wishes to protest against any of these surveys must file a written protest with the Bureau of Land Management New Mexico State Director stating that they wish to protest.

A statement of reasons for a protest may be filed with the Notice of protest to the State Director or the statement of reasons must be filed with the State Director within thirty (30) days after the protest is filed.

Robert A. Casias,

Deputy State Director of Cadastral, Survey/ GeoSciences.

[FR Doc. 2011–11251 Filed 5–6–11; 8:45 am]

BILLING CODE 4310–FB–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLES956000–L14200000–BJ0000]

Eastern States: Filing of Plat of Survey

AGENCY: Bureau of Land Management, Interior.

ACTION: Correction of Notice of Filing of Plat of Survey; Minnesota.

SUMMARY: The Bureau of Land Management (BLM) is issuing a correction to its notice of filing of plat of survey; Minnesota. BLM will file the plat of survey of the lands described below in the BLM-Eastern States office in Springfield, Virginia, 30 calendar days from the date of publication in the **Federal Register.**

FOR FURTHER INFORMATION CONTACT: Bureau of Land Management-Eastern States, 7450 Boston Boulevard, Springfield, Virginia 22153; *Attn:* Cadastral Survey. Persons who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 to contact the above individual during normal business hours. The FIRS is available 24 hours a day, 7 days a week, to leave a message or question with the above individual. You will receive a reply during normal business hours.

SUPPLEMENTARY INFORMATION: On March 23, 2011, we published in the **Federal Register** (76 FR 6811) a notice of filing of plat of survey which erroneously listed lands surveyed. This notice correctly lists the lands surveyed. This survey was requested by the Bureau of Indian Affairs.

The lands surveyed are:

Fifth Principal Meridian, Minnesota

T. 145 N. R. 40 W.

The plat of survey represents the corrective dependent resurvey of a portion of the East and West boundary, a portion of the subdivisional lines, a portion of sections subdivisions, and the subdivision of sections 31, 34 and 35, Township 145 North, Range 40 West, of the Fifth Principal Meridian, in the State of Minnesota, and was accepted February 3, 2011.

We will place a copy of the plat we described in the open files. It will be available to the public as a matter of information.

If the BLM receives a protest against the survey, as shown on the plat, prior to the date of the official filing, we will stay the filing pending our consideration of the protest.

We will not officially file the plat until the day after we have accepted or dismissed all protests and they have become final, including decisions on appeals.

Dated: April 29, 2011.

Dominica Van Koten,

Chief Cadastral Surveyor.

[FR Doc. 2011–11249 Filed 5–6–11; 8:45 am]

BILLING CODE 4310–GJ–P

DEPARTMENT OF THE INTERIOR

National Park Service

Captain John Smith Chesapeake National Historic Trail Advisory Council

AGENCY: National Park Service, Interior.

ACTION: Notice of meeting.

SUMMARY: As required by the Federal Advisory Committee Act, the National Park Service (NPS) is hereby giving notice that the Advisory Committee on the Captain John Smith Chesapeake National Historic Trail will hold a meeting. Designated through an amendment to the National Trails System Act (16 U.S.C. 1241), the trail consists of "a series of water routes extending approximately 3,000 miles along the Chesapeake Bay and its tributaries in the States of Virginia, Maryland, Delaware, and in the District of Columbia," tracing the 1607–1609 voyages of Captain John Smith to chart the land and waterways of the Chesapeake Bay. This meeting is open to the public. Preregistration is required for both public attendance and comment. Any individual who wishes to attend the meeting and/or participate in the public comment session should register via e-mail at *Christine_Lucero@nps.gov* or *telephone:* (757) 258–8914. For those wishing to make comments, please provide a written summary of your comments prior to the meeting. The Designated Federal Official for the Advisory Council is John Maounis, Superintendent, Captain John Smith National Historic Trail, *telephone:* (410) 260–2471.

DATES: The Captain John Smith Chesapeake National Historic Trail Advisory Council will meet from 10 a.m. to 4:30 p.m. on Wednesday, June 8, 2011.

ADDRESSES: The meeting will be held at the Joe Macknis Memorial Conference Room (Fish Shack), 410 Severn Avenue, Annapolis, MD 21403. For more information, please contact the NPS Chesapeake Bay Office, 410 Severn Avenue, Suite 314, Annapolis, MD 21403.

FOR FURTHER INFORMATION CONTACT: Christine Lucero, Partnership Coordinator for the Captain John Smith Chesapeake National Historic Trail, *telephone:* (757) 258–8914 or *e-mail: Christine_Lucero@nps.gov.*

SUPPLEMENTARY INFORMATION: Under section 10(a)(2) of the Federal Advisory Committee Act (5 U.S.C. App.), this notice announces a meeting of the Captain John Smith Chesapeake National Historic Trail Advisory Council for the purpose of reviewing initiatives in the Comprehensive Management Plan.

The Committee meeting is open to the public. Members of the public who would like to make comments to the Committee should preregister via e-mail at *Christine_Lucero@nps.gov* or *telephone:* (757) 258–8914; a written summary of comments should be

provided prior to the meeting. Comments will be taken for 30 minutes at the end of the meeting (from 4 p.m. to 4:30 p.m.). Before including your address, telephone number, e-mail address, or other personal indentifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so. All comments will be made part of the public record and will be electronically distributed to all Committee members.

Dated: April 29, 2011.

John Maounis,

Superintendent, Captain John Smith National Historic Trail, National Park Service, Department of the Interior.

[FR Doc. 2011–11158 Filed 5–6–11; 8:45 am]

BILLING CODE 4312–52–P

INTERNATIONAL TRADE COMMISSION

[Investigation No. 337–TA–734]

In the Matter of Certain Adjustable-Height Beds and Components Thereof; Notice of Commission Decision Not To Review an Initial Determination Granting a Joint Motion To Terminate the Investigation Based on a Settlement Agreement and Consent Order

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission has determined not to review an initial determination ("ID") (Order No. 21) issued by the presiding administrative law judge ("ALJ") granting a joint motion to terminate the above-captioned investigation based on a settlement agreement and consent order.

FOR FURTHER INFORMATION CONTACT: Daniel E. Valencia, Office of the General Counsel, U.S. International Trade Commission, 500 E Street, SW., Washington, DC 20436, telephone (202) 205–1999. Copies of non-confidential documents filed in connection with this investigation are or will be available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 500 E Street, SW., Washington, DC 20436, telephone (202) 205–2000. General information concerning the Commission may also be obtained by accessing its Internet server at *http://www.usitc.gov.* The public record for this investigation may be viewed on the Commission's electronic docket (EDIS) at *http://edis.usitc.gov.* Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on (202) 205–1810.

SUPPLEMENTARY INFORMATION: The Commission instituted this investigation on September 9, 2010, based on a complaint filed by Invacare Corporation of Elyria, Ohio ("Invacare"). 75 FR. 54911. The complaint alleges violations of section 337 of the Tariff Act of 1930 (19 U.S.C. 1337) in the importation into the United States, the sale for importation, and the sale within the United States after importation of certain adjustable-height beds and components thereof by reason of infringement of various United States Patents. The original complaint named Medical Depot, Inc., of Port Washington, New York d/b/a Drive Medical Design and Manufacturing and Shanghai Shunlong Physical Therapy Equipment Co., Ltd. of China as respondents (collectively, "the respondents").

On March 31, 2011, Invacare and the respondents filed a joint motion to terminate the investigation based on a consent order and settlement agreement. The Commission investigative attorney supported the motion.

On April 14, 2011, the ALJ issued the subject ID granting the joint motion to terminate the investigation. No petitions for review of the ID were filed. The Commission has determined not to review the ALJ's ID.

The authority for the Commission's determination is contained in section 337 of the Tariff Act of 1930, as amended (19 U.S.C. 1337), and in section 210 of the Commission's Rules of Practice and Procedure (19 CFR 210).

By order of the Commission.

Issued: May 4, 2011.

James R. Holbein,

Acting Secretary to the Commission.

[FR Doc. 2011–11195 Filed 5–6–11; 8:45 am]

BILLING CODE P

DEPARTMENT OF JUSTICE

Notice of Lodging of a Consent Decree Under The Clean Water Act, The Clean Air Act, and The Federal Pipeline Safety Laws

Notice is hereby given that on May 3, 2011, a proposed Consent Decree in *United States* v. *BP Exploration (Alaska) Inc.,* Civil Action No. 3:09–CV–00064–JWS was lodged with the United States District Court for the District of Alaska.

In this action the United States seeks civil penalties and injunctive relief for violations of the Clean Water Act, 33 U.S.C. 1311, 1319, 1321, as amended by the Oil Pollution Act of 1990, 33 U.S.C. 2701 *et seq.;* the Clean Air Act (CAA), 42 U.S.C. 7401–7671q; and the Federal Pipeline Safety Laws, 49 U.S.C. 60101 *et seq.,* in connection with BP Exploration (Alaska) Inc. ("BPXA")'s operation of oil pipelines on the North Slope of Alaska. The Clean Water Act claims in the Complaint arise from two unauthorized discharges of crude oil in the spring and summer of 2006, as well as violations of the Spill Prevention Control and Countermeasure regulations. The Clean Air Act claims against BPXA arise from the improper removal of asbestos-containing material from its pipelines in the spring and summer of 2006, in violation of CAA regulations. The Pipeline Safety Law claims arise from BPXA's failure to comply with an order issued by the Pipeline and Hazardous Materials Safety Administration of the United States Department of Transportation pursuant to 49 U.S.C. 60112, requiring BPXA to perform corrective action on its pipelines.

Under the proposed Consent Decree, BPXA will be required to implement a comprehensive integrity management program to maintain its oil pipelines in Prudhoe Bay. BPXA will also pay $25 million in civil penalties.

The Department of Justice will receive for a period of thirty (30) days from the date of this publication comments relating to the proposed Consent Decree. Comments should be addressed to the Assistant Attorney General, Environment and Natural Resources Division, and either e-mailed to *pubcomment-ees.enrd@usdoj.gov* or mailed to P.O. Box 7611, U.S. Department of Justice, Washington, DC 20044–7611, and should refer to *United States* v. *BP Exploration (Alaska) Inc.,* D.J. Ref. 90–5–1–1–08808.

The proposed Consent Decree may be examined at the U.S. Environmental Protection Agency, Region 10, 1200 Sixth Avenue, Seattle, WA 98101 (contact Associate Regional Counsel Stephanie Mairs (206) 553–7359). During the public comment period, the proposed Consent Decree may also be examined on the following Department of Justice Web site, at *http://www.usdoj.gov/enrd/Consent_Decrees.html.* A copy of the proposed consent decree may also be obtained by mail from the Consent Decree Library, P.O. Box 7611, U.S.

Department of Justice, Washington, DC 20044–7611 or by faxing or e-mailing a request to Tonia Fleetwood (*tonia.fleetwood@usdoj.gov*), fax no. (202) 514–0097, phone confirmation number (202) 514–1547. In requesting a copy from the Consent Decree Library, please enclose a check in the amount of $32 for complete Consent Decree or $15.75 for the Consent Decree without the appendices (25 cents per page reproduction cost) payable to the U.S. Treasury or, if by e-mail or fax, forward a check in that amount to the Consent Decree Library at the stated address.

Robert E. Maher, Jr.,

Assistant Section Chief, Environmental Enforcement Section, Environment and Natural Resources Division.

[FR Doc. 2011–11174 Filed 5–6–11; 8:45 am]

BILLING CODE 4410–15–P

DEPARTMENT OF LABOR

Employment and Training Administration

Workforce Investment Act of 1998 (WIA); Notice of Incentive Funding Availability Based on Program Year (PY) 2009 Performance

AGENCY: Employment and Training Administration, Labor.

ACTION: Notice.

SUMMARY: The Department of Labor, in collaboration with the Department of Education, announces that four states are eligible to apply for Workforce Investment Act (WIA) (Pub. L. 105–220, 29 U.S.C. 2801 *et seq.*) incentive grant awards authorized by section 503 of the WIA.

DATES: The four eligible states must submit their applications for incentive funding to the Department of Labor by June 23, 2011.

ADDRESSES: Submit applications to the Employment and Training Administration, Office of Policy Development and Research, Division of Strategic Planning and Performance, 200 Constitution Avenue, NW., Room N–5641, Washington, DC 20210, *Attention:* Karen Staha and Luke Murren, Telephone number: 202–693–3733 (this is not a toll-free number). Fax: 202–693–2766. *E-mail: staha.karen@dol.gov* and *murren.luke@dol.gov.* Information may also be found at the ETA Performance *Web site: http://www.doleta.gov/performance.*

SUPPLEMENTARY INFORMATION: Four states (see Appendix) qualify to receive a share of the $10.2 million available for incentive grant awards under WIA section 503. These funds, which were contributed by the Department of Education from appropriations for the Adult Education and Family Literacy Act (AEFLA), are available for the eligible states to use through June 30, 2013, to support innovative workforce development and education activities that are authorized under title IB (Workforce Investment Systems) or Title II (AEFLA) of WIA, or under the Carl D. Perkins Career and Technical Education Act of 2006 (Perkins IV), 20 U.S.C. 2301 *et seq.,* as amended by Public Law 109–270. In order to qualify for a grant award, a state must have exceeded its performance levels for WIA title IB and adult education (AEFLA). (Due to the lack of availability of PY 2009 performance data under the Carl D. Perkins Vocational and Technical Education Act of 1998 (Perkins III), the Department of Labor and the Department of Education did not consider states' performance levels under the Perkins Act in determining incentive grants eligibility.) The goals included employment after training and related services, retention in employment, and improvements in literacy levels, among other measures. After review of the performance data submitted by states to the Department of Labor and to the Department of Education, each Department determined for its program(s) which states exceeded their performance levels (the Appendix at the bottom of this notice lists the eligibility of each state by program). These lists were compared, and states that exceeded their performance levels for both programs are eligible to apply for and receive an incentive grant award. The amount that each state is eligible to receive was determined by the Department of Labor and the Department of Education, based on the provisions in WIA section 503(c) (20 U.S.C. 9273(c)), and is proportional to the total funding received by these states for WIA Title IB and AEFLA programs.

The states eligible to apply for incentive grant awards and the amounts they are eligible to receive are listed in the following chart:

State	Amount of award
1. Arizona	$3,000,000
2. Minnesota	3,000,000
3. North Dakota	1,210,964
4. Texas	3,000,000

Dated: May 2, 2011.

Jane Oates,

Assistant Secretary for Employment and Training.

[FR Doc. 2011–11191 Filed 5–6–11; 8:45 am]

BILLING CODE 4510–FN–P

LIBRARY OF CONGRESS

Copyright Office

[Docket No. 2010–4]

Federal Copyright Protection of Sound Recordings Fixed Before February 15, 1972

AGENCY: Copyright Office, Library of Congress.

ACTION: Notice of public meeting.

SUMMARY: The Copyright Office will host a public meeting to discuss the desirability and means of bringing sound recordings fixed before February 15, 1972 under Federal jurisdiction. The meeting will provide a forum, in the form of a roundtable discussion, for interested parties to address the legal, policy, and factual questions raised so far regarding pre-1972 sound recordings. It will take place on June 2 and 3, 2011 at the Copyright Office in Washington, DC. In order to participate in the meeting, interested parties should submit a request via the Copyright Office Web site.

DATES: The public meeting will take place on Thursday, June 2, 2011 from 9 a.m. to 5 p.m. and Friday, June 3, 2011 from 9 a.m. to 1:30 p.m. Requests for participation must be received in the Office of the General Counsel of the Copyright Office no later than Monday, May 16, 2011 at 5 p.m. E.D.T.

ADDRESSES: The public meeting will take place in the Copyright Office Hearing Room, Room LM–408 of the Madison Building of the Library of Congress, 101 Independence Ave., SE., Washington, DC. The Copyright Office strongly prefers that requests for participation be submitted electronically. A public meeting page containing a request form is posted on the Copyright Office Web site at *http://www.copyright.gov/docs/sound/.* Persons who are unable to submit a request electronically should contact Attorney-Advisor Chris Weston at 202–707–8380.

FOR FURTHER INFORMATION CONTACT: David O. Carson, General Counsel, or Chris Weston, Attorney-Advisor, Copyright GC/I&R, P.O. Box 70400, Washington, DC 20024. *Telephone:* (202) 707–8380. *Telefax:* (202) 707–8366.

SUPPLEMENTARY INFORMATION:

Background

Congress has directed the U.S. Copyright Office to conduct a study on the desirability and means of bringing sound recordings fixed before February 15, 1972 under Federal jurisdiction. Currently, such sound recordings are protected under a patchwork of state statutory and common laws from their date of creation until 2067. The legislation mandating this study states that it is to:

> cover the effect of federal coverage on the preservation of such sound recordings, the effect on public access to those recordings, and the economic impact of federal coverage on rights holders. The study is also to examine the means for accomplishing such coverage.

H.R. 1105, Public Law 111–8 [Legislative Text and Explanatory Statement] 1769.

On November 3, 2010, the U.S. Copyright Office published a Notice of Inquiry seeking comments on the question of bringing pre-1972 sound recordings under Federal jurisdiction. 75 FR 67777 (November 3, 2010). The notice provided background as to why state law protection of pre-1972 sound recordings has not been preempted, unlike state law protection of other kinds of potentially copyrightable works. It also discussed the belief of some in the library and archives community that the absence of a Federal protection scheme for sound recordings has impeded the preservation and public availability of these recordings. In an attempt to understand the various effects that federalizing protection for pre-1972 sound recordings might have, the notice posed 30 specific questions to commenters regarding preservation and access, economic impact, term of protection, constitutional considerations, and other aspects of federalization.

The Copyright Office received 58 comments in response to its inquiry, along with 231 copies of a form letter. The Office subsequently received 17 reply comments. All comments, along with the notice of inquiry, are available at *http://www.copyright.gov/docs/sound/.* The comments ran the gamut from general policy arguments to proposals for new legislative language and, as anticipated, illuminate a variety of experiences and perspectives. Some comments raised new legal questions, and others deepened the Office's understanding of the number and variety of pre-1972 sound recordings at issue. The Copyright Office is holding a public meeting in order to permit interested parties to present their views and discuss areas of agreement and disagreement through a roundtable discussion.

Requests for Participation

The Office has divided up the topics it wishes to discuss into nine sessions—five on June 2, 2011 and four on June 3, 2011—and briefly describes them below. These descriptions only note the major issues for each session and do not necessarily list every subject appropriate for discussion.

Day 1, Session 1—Assessing the Landscape: What are the legal and cultural difficulties—as well as benefits—attributable to state law protection of pre-1972 sound recordings?

Day 1, Session 2—Availability of Pre-1972 Sound Recordings: What is the true extent of public availability of pre-1972 sound recordings? In relation to the overall availability of such recordings, how significant are rights-holder reissue programs and recent donations to the Library of Congress?

Day 1, Session 3—Effects of Federalization on Preservation, Access, and Value: What benefits would federalization have with respect to preservation of and public access to pre-1972 sound recordings? Are those benefits quantifiable (i.e., in economic or cultural terms)? How would federalization affect the economic and cultural value of pre-1972 sound recordings? Are such effects quantifiable?

*Day 1, Session 4—Effects of Federalization on Ownership and Business E*xpectations: What effects would federalization have with respect to ownership status, publication status, contracts, termination rights, registration requirements, and other business aspects of pre-1972 sound recordings? To what extent would these results depend on the manner in which federalization might be effected?

Day 1, Session 5—Effects of Federalization on Statutory Licensing: As a matter of logic, policy, and law, should pre-1972 sound recordings be eligible for the section 114 statutory license? Can and should they be subject to the section 114 statutory license if they are not otherwise brought into the Federal statutory scheme?

Day 2, Session 1—Term of Protection: Assuming that copyright protection for pre-1972 sound recordings is federalized, what are the best options for the term of protection of federalized pre-1972 sound recordings? Should pre-1923 recordings be considered separately? What about unpublished recordings? If federalized pre-1972 sound recordings are given shorter terms than they had under state law, should term extensions be offered as an incentive to rights-holders who make their recordings publicly available within a specified period of time?

Day 2, Session 2—Constitutional Considerations: Is it appropriate to grant Federal copyright protection to works already created, fixed, and in some cases published? Are there circumstances under which federalization of pre-1972 sound recordings would effect a "taking" under the Fifth Amendment? If so, how could this be addressed in the legislation?

Day 2, Session 3—Alternatives to Federalization: What alternatives to federalization, if any, should be considered and why?

Day 2, Session 4—Summing Up: In light of this public meeting and of the comments received, please sum up your views on (1) whether pre-1972 sound recordings should be brought within the protection of Federal copyright law and (2) in the case of federalization, what adaptations to existing law would be necessary or advisable.

Requests to participate should be submitted online at *http://www.copyright.gov/docs/sound/.* The online form asks for the requestor's name, organization, title, postal mailing address, telephone number, fax number, and an e-mail address, although not all of the information is required. The requestor should also indicate, in order of preference, the sessions in which the requestor wishes to participate. Depending upon the level of interest, the Copyright Office may not be able to seat every participant in every session he or she requests, so it is helpful to know which topics are most important to each participant. In addition, please note that while an organization may bring multiple representatives, only one person per organization may participate in a particular session. A different person from the same organization may, of course, participate in another session.

Requestors who have already submitted a comment, or who will be representing an organization that has submitted a comment, are asked to identify their comments on the request form. Requestors who have not submitted comments should include a brief summary of their views on the topics they wish to discuss, either directly on the request form or as an attachment. To meet accessibility standards, all attachments must be uploaded in either the Adobe Portable Document File (PDF) format that contains searchable, accessible text (not an image); Microsoft Word; WordPerfect; Rich Text Format (RTF); or ASCII text file format (not a scanned

document). The name of the submitter and organization (if any) should appear on both the form and the face of any attachments.

Nonparticipants who wish to attend and observe the discussion should note that seating is limited and, for nonparticipants, will be available on a first come, first served basis.

Dated: May 4, 2011.

Maria A. Pallante,

Acting Register of Copyrights.

[FR Doc. 2011–11224 Filed 5–6–11; 8:45 am]

BILLING CODE 1410–30–P

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[Notice (11–045)]

NASA Advisory Council; Task Group of the Science Committee; Meeting

AGENCY: National Aeronautics and Space Administration.

ACTION: Notice of meeting.

SUMMARY: In accordance with the Federal Advisory Committee Act, Public Law 92–463, as amended, the National Aeronautics and Space Administration (NASA) announces a meeting of the Task Group of the NASA Advisory Council (NAC) Science Committee. This Task Group reports to the Science Committee of the NAC. The Meeting will be held for the purpose of soliciting from the scientific community and other persons scientific and technical information relevant to program planning.

DATES: Wednesday, May 25, 2 p.m. to 4 p.m., Local Time.

ADDRESSES: This meeting will take place telephonically and by WebEx. Any interested person may call the USA toll free conference call number 800–369–3194, pass code TAGAGMAY25, to participate in this meeting by telephone. The WebEx link is *https://nasa.webex.com/,* meeting number 993 198 285, and password tagag_May25.

FOR FURTHER INFORMATION CONTACT: Ms. Marian Norris, Science Mission Directorate, NASA Headquarters, Washington, DC 20546, (202) 358–4452, fax (202) 358–4118, or *mnorris@nasa.gov.*

SUPPLEMENTARY INFORMATION: The agenda for the meeting includes the following topic:

—Organizing Analysis Groups to Serve the Needs of More than One NASA Mission Directorate.

It is imperative that the meeting be held on these dates to accommodate the scheduling priorities of the key participants.

Dated: May 2, 2011.

P. Diane Rausch,

Advisory Committee Management Officer, National Aeronautics and Space Administration.

[FR Doc. 2011–11163 Filed 5–6–11; 8:45 am]

BILLING CODE 7510–13–P

NUCLEAR REGULATORY COMMISSION

[Docket Nos. 50–250 and 50–251; NRC–2011–0094]

Florida Power & Light Company; Turkey Point, Units 3 and 4; Notice of Consideration of Issuance of Amendment to Facility Operating License, and Opportunity for a Hearing and Order Imposing Procedures for Document Access to Sensitive Unclassified Non-Safeguards Information

AGENCY: Nuclear Regulatory Commission.

ACTION: Notice of license amendment request, opportunity to comment, opportunity to request a hearing, and Commission order.

DATES: A request for a hearing must be filed by July 8, 2011. Any potential party as defined in Title 10 of the Code of Federal Regulations (10 CFR) 2.4 who believes access to Sensitive Unclassified Non-Safeguards Information (SUNSI) is necessary to respond to this notice must request document access by May 19, 2011.

ADDRESSES: Please include Docket ID NRC–2011–0094 in the subject line of your comments. Comments submitted in writing or in electronic form will be posted on the NRC Web site and on the Federal rulemaking Web site *http://www.regulations.gov.* Because your comments will not be edited to remove any identifying or contact information, the NRC cautions you against including any information in your submission that you do not want to be publicly disclosed.

The NRC requests that any party soliciting or aggregating comments received from other persons for submission to the NRC inform those persons that the NRC will not edit their comments to remove any identifying or contact information, and therefore, they should not include any information in their comments that they do not want publicly disclosed.

You may submit comments by any of the following methods:

- *Federal Rulemaking Web site:* Go to *http://www.regulations.gov* and search for documents filed under Docket ID NRC–2011–0094. Address questions about NRC dockets to Carol Gallagher 301–492–3668; e-mail *Carol.Gallagher@nrc.gov.*

You can access publicly available documents related to this notice using the following methods:

- *Mail comments to:* Cindy Bladey, Chief, Rules, Announcements, and Directives Branch (RADB), Office of Administration, *Mail Stop:* TWB–05–B01M, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001.
- *NRC's Public Document Room (PDR):* The public may examine, and have copied for a fee, publicly available documents at the NRC's PDR, Room O1–F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852.
- *NRC's Agencywide Documents Access and Management System (ADAMS):* Publicly available documents created or received at the NRC are available online in the NRC's Library at *http://www.nrc.gov/reading-rm/adams.html.* From this page, the public can gain entry into ADAMS, which provides text and image files of NRC's public documents. If you do not have access to ADAMS or if there are problems in accessing the documents located in ADAMS, contact the NRC's PDR reference staff at 1–800–397–4209, 301–415–4737, or by e-mail to *pdr.resource@nrc.gov.* The application for amendment, dated October 21, 2010, contains proprietary information and, accordingly, those portions are being withheld from public disclosure. A redacted version of the application for amendment, dated December 14, 2010, is available electronically under ADAMS Accession No. ML103560167.
- *Federal Rulemaking Web site:* Public comments and supporting materials related to this notice can be found at *http://www.regulations.gov* by searching on Docket ID: NRC–2011–0094.

FOR FURTHER INFORMATION CONTACT: Jason C. Paige, Project Manager, Plant Licensing Branch II–2, Division of Operating Reactor Licensing, Office of Nuclear Reactor Regulation, U.S. Nuclear Regulatory Commission, Washington, DC 20555. *Telephone:* 301–415–5888; *fax number:* 301–415–2102; *e-mail: Jason.Paige@nrc.gov.*

SUPPLEMENTARY INFORMATION:

I. Introduction

The U.S. Nuclear Regulatory Commission (NRC or the Commission)

is considering issuance of an amendment to Facility Operating License Nos. DPR–31 and DPR–41 issued to Florida Power & Light Co. (the licensee) for operation of the Turkey Point Nuclear Generating Station, Units 3 and 4, located in Miami-Dade County, Florida.

The proposed amendment would increase the licensed core power level for Turkey Point, Units 3 and 4, from 2300 megawatts thermal (MWt) to 2644 MWt. The increase in core thermal power will be approximately 15 percent, including a 13 percent power uprate and a 1.7 percent measurement uncertainty recapture, over the current licensed core thermal power level and is categorized as an Extended Power Uprate. The proposed amendment would modify the Renewed Facility Operating Licenses, the technical specifications and licensing bases to support operation at the increased core thermal power level.

Before issuance of the proposed license amendment, the Commission will have made findings required by the Atomic Energy Act of 1954, as amended (the Act), and the Commission's regulations.

The amendment will not be issued prior to a hearing unless the staff makes a determination that the amendment involves no significant hazards considerations. If a request for a hearing is received, the Commission's staff may issue the amendment after it completes its technical review and prior to the completion of any required hearing if it publishes a further notice for public comment of its proposed finding of no significant hazards consideration in accordance with 10 CFR 50.91 and 50.92.

II. Opportunity To Request a Hearing

Requirements for hearing requests and petitions for leave to intervene are found in 10 CFR 2.309, "Hearing requests, petitions to intervene, requirements for standing, and contentions." Interested persons should consult 10 CFR 2.309, which is available at the NRC's PDR, located at O1–F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852 (or call the PDR at 1–800–397–4209 or 301–415–4737). The NRC regulations are also accessible online in the NRC's Library at *http://www.nrc.gov/reading-rm/adams.html.*

III. Petitions for Leave To Intervene

Any person whose interest may be affected by this proceeding and who wishes to participate as a party in the proceeding must file a written petition for leave to intervene. As required by 10 CFR 2.309, a petition for leave to intervene shall set forth with particularity the interest of the requestor/petitioner in the proceeding and how that interest may be affected by the results of the proceeding. The petition must provide the name, address, and telephone number of the requestor or petitioner and specifically explain the reasons why the intervention should be permitted with particular reference to the following factors: (1) The nature of the requestor's/petitioner's right under the Act to be made a party to the proceeding; (2) the nature and extent of the requestor's/petitioner's property, financial, or other interest in the proceeding; and (3) the possible effect of any decision or order which may be entered in the proceeding on the requestor's/petitioner's interest.

A petition for leave to intervene must also include a specification of the contentions that the petitioner seeks to have litigated in the hearing. For each contention, the requestor/petitioner must provide a specific statement of the issue of law or fact to be raised or controverted, as well as a brief explanation of the basis for the contention. Additionally, the requestor/petitioner must demonstrate that the issue raised by each contention is within the scope of the proceeding and is material to the findings the NRC must make to support the granting of a license amendment in response to the application. The petition must include a concise statement of the alleged facts or expert opinions which support the position of the requestor/petitioner and on which the requestor/petitioner intends to rely at hearing, together with references to the specific sources and documents on which the requestor/petitioner intends to rely. Finally, the petition must provide sufficient information to show that a genuine dispute exists with the applicant on a material issue of law or fact, including references to specific portions of the application for amendment that the requestor/petitioner disputes and the supporting reasons for each dispute, or, if the requestor/petitioner believes that the application for amendment fails to contain information on a relevant matter as required by law, the identification of each failure and the supporting reasons for the requestor's/petitioner's belief. Each contention must be one which, if proven, would entitle the requestor/petitioner to relief.

Those permitted to intervene become parties to the proceeding, subject to any limitations in the order granting leave to intervene, and have the opportunity to participate fully in the conduct of the hearing with respect to resolution of that person's admitted contentions, including the opportunity to present evidence and to submit a cross-examination plan for cross-examination of witnesses, consistent with NRC regulations, policies, and procedures. The Atomic Safety and Licensing Board (the Licensing Board) will set the time and place for any prehearing conferences and evidentiary hearings, and the appropriate notices will be provided.

Non-timely petitions for leave to intervene and contentions, amended petitions, and supplemental petitions will not be entertained absent a determination by the Commission, the Licensing Board or a presiding officer that the petition should be granted and/or the contentions should be admitted based upon a balancing of the factors specified in 10 CFR 2.309(c)(1)(i)–(viii).

A State, county, municipality, Federally-recognized Indian Tribe, or agencies thereof, may submit a petition to the Commission to participate as a party under 10 CFR 2.309(d)(2). The petition should state the nature and extent of the petitioner's interest in the proceeding. The petition should be submitted to the Commission by July 8, 2011. The petition must be filed in accordance with the filing instructions in Section IV of this document, and should meet the requirements for petitions for leave to intervene set forth in this section, except that State and Federally-recognized Indian Tribes do not need to address the standing requirements in 10 CFR 2.309(d)(1) if the facility is located within its boundaries. The entities listed above could also seek to participate in a hearing as a nonparty pursuant to 10 CFR 2.315(c).

Any person who does not wish, or is not qualified, to become a party to this proceeding may request permission to make a limited appearance pursuant to the provisions of 10 CFR 2.315(a). A person making a limited appearance may make an oral or written statement of position on the issues, but may not otherwise participate in the proceeding. A limited appearance may be made at any session of the hearing or at any prehearing conference, subject to such limits and conditions as may be imposed by the Licensing Board. Persons desiring to make a limited appearance are requested to inform the Secretary of the Commission by July 8, 2011.

If a hearing is requested, the Commission will make a final determination on the issue of no significant hazards consideration. The final determination will serve to decide when the hearing is held. If the final

determination is that the amendment request involves no significant hazards consideration, the Commission may issue the amendment and make it immediately effective, notwithstanding the request for a hearing. Any hearing held would take place after issuance of the amendment. If the final determination is that the amendment request involves a significant hazards consideration, then any hearing held would take place before the issuance of any amendment.

IV. Electronic Submissions (E-Filing)

All documents filed in NRC adjudicatory proceedings, including a request for hearing, a petition for leave to intervene, any motion or other document filed in the proceeding prior to the submission of a request for hearing or petition to intervene, and documents filed by interested governmental entities participating under 10 CFR 2.315(c), must be filed in accordance with the NRC E-Filing rule (72 FR 49139, August 28, 2007). The E-Filing process requires participants to submit and serve all adjudicatory documents over the Internet, or in some cases to mail copies on electronic storage media. Participants may not submit paper copies of their filings unless they seek an exemption in accordance with the procedures described below.

To comply with the procedural requirements of E-Filing, at least ten (10) days prior to the filing deadline, the participant should contact the Office of the Secretary by e-mail at *hearing.docket@nrc.gov,* or by telephone at 301–415–1677, to request (1) a digital identification (ID) certificate, which allows the participant (or its counsel or representative) to digitally sign documents and access the E-Submittal server for any proceeding in which it is participating; and (2) advise the Secretary that the participant will be submitting a request or petition for hearing (even in instances in which the participant, or its counsel or representative, already holds an NRC-issued digital ID certificate). Based upon this information, the Secretary will establish an electronic docket for the hearing in this proceeding if the Secretary has not already established an electronic docket.

Information about applying for a digital ID certificate is available on the NRC's public Web site at *http://www.nrc.gov/site-help/e-submittals/apply-certificates.html.* System requirements for accessing the E-Submittal server are detailed in the NRC's "Guidance for Electronic Submission," which is available on the NRC's public Web site at *http://www.nrc.gov/site-help/e-submittals.html.* Participants may attempt to use other software not listed on the Web site, but should note that the NRC's E-Filing system does not support unlisted software, and the NRC Meta System Help Desk will not be able to offer assistance in using unlisted software.

If a participant is electronically submitting a document to the NRC in accordance with the E-Filing rule, the participant must file the document using the NRC's online, Web-based submission form. In order to serve documents through the Electronic Information Exchange System, users will be required to install a Web browser plug-in from the NRC Web site. Further information on the Web-based submission form, including the installation of the Web browser plug-in, is available on the NRC's public Web site at *http://www.nrc.gov/site-help/e-submittals.html.*

Once a participant has obtained a digital ID certificate and a docket has been created, the participant can then submit a request for hearing or petition for leave to intervene. Submissions should be in Portable Document Format (PDF) in accordance with NRC guidance available on the NRC public Web site at *http://www.nrc.gov/site-help/e-submittals.html.* A filing is considered complete at the time the documents are submitted through the NRC's E-Filing system. To be timely, an electronic filing must be submitted to the E-Filing system no later than 11:59 p.m. Eastern Time on the due date. Upon receipt of a transmission, the E-Filing system time-stamps the document and sends the submitter an e-mail notice confirming receipt of the document. The E-Filing system also distributes an e-mail notice that provides access to the document to the NRC Office of the General Counsel and any others who have advised the Office of the Secretary that they wish to participate in the proceeding, so that the filer need not serve the documents on those participants separately. Therefore, applicants and other participants (or their counsel or representative) must apply for and receive a digital ID certificate before a hearing request/petition to intervene is filed so that they can obtain access to the document via the E-Filing system.

A person filing electronically using the agency's adjudicatory E-Filing system may seek assistance by contacting the NRC Meta System Help Desk through the "Contact Us" link located on the NRC Web site at *http://www.nrc.gov/site-help/e-submittals.html,* by e-mail at *MSHD.Resource@nrc.gov,* or by a toll-free call at 1–866–672–7640. The NRC Meta System Help Desk is available between 8 a.m. and 8 p.m., Eastern Time, Monday through Friday, excluding government holidays.

Participants who believe that they have a good cause for not submitting documents electronically must file an exemption request, in accordance with 10 CFR 2.302(g), with their initial paper filing requesting authorization to continue to submit documents in paper format. Such filings must be submitted by: (1) First-class mail addressed to the Office of the Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, *Attention:* Rulemaking and Adjudications Staff; or (2) courier, express mail, or expedited delivery service to the Office of the Secretary, Sixteenth Floor, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852, Attention: Rulemaking and Adjudications Staff. Participants filing a document in this manner are responsible for serving the document on all other participants. Filing is considered complete by first-class mail as of the time of deposit in the mail, or by courier, express mail, or expedited delivery service upon depositing the document with the provider of the service. A presiding officer, having granted an exemption request from using E-Filing, may require a participant or party to use E-Filing if the presiding officer subsequently determines that the reason for granting the exemption from use of E-Filing no longer exists.

Documents submitted in adjudicatory proceedings will appear in the NRC's electronic hearing docket which is available to the public at *http://ehd1.nrc.gov/EHD/*, unless excluded pursuant to an order of the Commission, or the presiding officer. Participants are requested not to include personal privacy information, such as social security numbers, home addresses, or home phone numbers in their filings, unless an NRC regulation or other law requires submission of such information. With respect to copyrighted works, except for limited excerpts that serve the purpose of the adjudicatory filings and would constitute a Fair Use application, participants are requested not to include copyrighted materials in their submission.

Petitions for leave to intervene must be filed no later than 60 days from July 8, 2011. Non-timely filings will not be entertained absent a determination by the presiding officer that the petition or request should be granted or the

contentions should be admitted, based on a balancing of the factors specified in 10 CFR 2.309(c)(1)(i)–(viii).

Attorney for licensee: M.S. Ross, Attorney, Florida Power & Light, P.O. Box 14000, Juno Beach, Florida 33408–0420.

Order Imposing Procedures for Access to Sensitive Unclassified Non-Safeguards Information for Contention Preparation

A. This Order contains instructions regarding how potential parties to this proceeding may request access to documents containing Sensitive Unclassified Non-Safeguards Information (SUNSI).

B. Within 10 days after publication of this notice of hearing and opportunity to petition for leave to intervene, any potential party as defined in 10 CFR 2.4 who believes access to SUNSI is necessary to respond to this notice may request such access. A "potential party" is any person who intends to participate as a party by demonstrating standing and filing an admissible contention under 10 CFR 2.309. Requests for access to SUNSI submitted later than 10 days after publication will not be considered absent a showing of good cause for the late filing, addressing why the request could not have been filed earlier.

C. The requestor shall submit a letter requesting permission to access SUNSI to the Office of the Secretary, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, *Attention:* Rulemakings and Adjudications Staff, and provide a copy to the Associate General Counsel for Hearings, Enforcement and Administration, Office of the General Counsel, Washington, DC 20555–0001. The expedited delivery or courier mail address for both offices is: U.S. Nuclear Regulatory Commission, 11555 Rockville Pike, Rockville, Maryland 20852. The e-mail address for the Office of the Secretary and the Office of the General Counsel are *Hearing.Docket@nrc.gov* and *OGCmailcenter@nrc.gov,* respectively.[1] The request must include the following information:

(1) A description of the licensing action with a citation to this **Federal Register** notice;

(2) The name and address of the potential party and a description of the potential party's particularized interest that could be harmed by the action identified in C.(1); and

(3) The identity of the individual or entity requesting access to SUNSI and the requestor's basis for the need for the information in order to meaningfully participate in this adjudicatory proceeding. In particular, the request must explain why publicly available versions of the information requested would not be sufficient to provide the basis and specificity for a proffered contention;

D. Based on an evaluation of the information submitted under paragraph C.(3) the NRC staff will determine within 10 days of receipt of the request whether:

(1) There is a reasonable basis to believe the petitioner is likely to establish standing to participate in this NRC proceeding; and

(2) The requestor has established a legitimate need for access to SUNSI.

E. If the NRC staff determines that the requestor satisfies both D.(1) and D.(2) above, the NRC staff will notify the requestor in writing that access to SUNSI has been granted. The written notification will contain instructions on how the requestor may obtain copies of the requested documents, and any other conditions that may apply to access to those documents. These conditions may include, but are not limited to, the signing of a Non-Disclosure Agreement or Affidavit, or Protective Order[2] setting forth terms and conditions to prevent the unauthorized or inadvertent disclosure of SUNSI by each individual who will be granted access to SUNSI.

F. Filing of Contentions. Any contentions in these proceedings that are based upon the information received as a result of the request made for SUNSI must be filed by the requestor no later than 25 days after the requestor is granted access to that information. However, if more than 25 days remain between the date the petitioner is granted access to the information and the deadline for filing all other contentions (as established in the notice of hearing or opportunity for hearing), the petitioner may file its SUNSI contentions by that later deadline.

G. Review of Denials of Access.

(1) If the request for access to SUNSI is denied by the NRC staff either after a determination on standing and need for access, or after a determination on trustworthiness and reliability, the NRC staff shall immediately notify the requestor in writing, briefly stating the reason or reasons for the denial.

(2) The requestor may challenge the NRC staff's adverse determination by filing a challenge within 5 days of receipt of that determination with: (a) The presiding officer designated in this proceeding; (b) if no presiding officer has been appointed, the Chief Administrative Judge, or if he or she is unavailable, another administrative judge, or an administrative law judge with jurisdiction pursuant to 10 CFR 2.318(a); or (c) if another officer has been designated to rule on information access issues, with that officer.

H. Review of Grants of Access. A party other than the requestor may challenge an NRC staff determination granting access to SUNSI whose release would harm that party's interest independent of the proceeding. Such a challenge must be filed with the Chief Administrative Judge within 5 days of the notification by the NRC staff of its grant of access.

If challenges to the NRC staff determinations are filed, these procedures give way to the normal process for litigating disputes concerning access to information. The availability of interlocutory review by the Commission of orders ruling on such NRC staff determinations (whether granting or denying access) is governed by 10 CFR 2.311.[3]

I. The Commission expects that the NRC staff and presiding officers (and any other reviewing officers) will consider and resolve requests for access to SUNSI, and motions for protective orders, in a timely fashion in order to minimize any unnecessary delays in identifying those petitioners who have standing and who have propounded contentions meeting the specificity and basis requirements in 10 CFR Part 2. Attachment 1 to this Order summarizes the general target schedule for processing and resolving requests under these procedures.

It is So Ordered.

Dated at Rockville, Maryland, this 2nd day of May 2011.

[1] While a request for hearing or petition to intervene in this proceeding must comply with the filing requirements of the NRC's "E-Filing Rule," the initial request to access SUNSI under these procedures should be submitted as described in this paragraph.

[2] Any motion for Protective Order or draft Non-Disclosure Affidavit or Agreement for SUNSI must be filed with the presiding officer or the Chief Administrative Judge if the presiding officer has not yet been designated, within 30 days of the deadline for the receipt of the written access request.

[3] Requestors should note that the filing requirements of the NRC's E-Filing Rule (72 FR 49139; August 28, 2007) apply to appeals of NRC staff determinations (because they must be served on a presiding officer or the Commission, as applicable), but not to the initial SUNSI request submitted to the NRC staff under these procedures.

For the Nuclear Regulatory Commission.

Annette L. Vietti-Cook,

Secretary of the Commission.

ATTACHMENT 1—GENERAL TARGET SCHEDULE FOR PROCESSING AND RESOLVING REQUESTS FOR ACCESS TO SENSITIVE UNCLASSIFIED NON-SAFEGUARDS INFORMATION IN THIS PROCEEDING

Day	Event/activity
0	Publication of **Federal Register** notice of hearing and opportunity to petition for leave to intervene, including order with instructions for access requests.
10	Deadline for submitting requests for access to Sensitive Unclassified Non-Safeguards Information (SUNSI) with information: supporting the standing of a potential party identified by name and address; describing the need for the information in order for the potential party to participate meaningfully in an adjudicatory proceeding.
60	Deadline for submitting petition for intervention containing: (i) Demonstration of standing; (ii) all contentions whose formulation does not require access to SUNSI (+25 Answers to petition for intervention; +7 requestor/petitioner reply).
20	Nuclear Regulatory Commission (NRC) staff informs the requestor of the staff's determination whether the request for access provides a reasonable basis to believe standing can be established and shows need for SUNSI. (NRC staff also informs any party to the proceeding whose interest independent of the proceeding would be harmed by the release of the information.) If NRC staff makes the finding of need for SUNSI and likelihood of standing, NRC staff begins document processing (preparation of redactions or review of redacted documents).
25	If NRC staff finds no "need" or no likelihood of standing, the deadline for requestor/petitioner to file a motion seeking a ruling to reverse the NRC staff's denial of access; NRC staff files copy of access determination with the presiding officer (or Chief Administrative Judge or other designated officer, as appropriate). If NRC staff finds "need" for SUNSI, the deadline for any party to the proceeding whose interest independent of the proceeding would be harmed by the release of the information to file a motion seeking a ruling to reverse the NRC staff's grant of access.

ATTACHMENT 1—GENERAL TARGET SCHEDULE FOR PROCESSING AND RESOLVING REQUESTS FOR ACCESS TO SENSITIVE UNCLASSIFIED NON-SAFEGUARDS INFORMATION IN THIS PROCEEDING—Continued

Day	Event/activity
30	Deadline for NRC staff reply to motions to reverse NRC staff determination(s).
40	(Receipt +30) If NRC staff finds standing and need for SUNSI, deadline for NRC staff to complete information processing and file motion for Protective Order and draft Non-Disclosure Affidavit. Deadline for applicant/licensee to file Non-Disclosure Agreement for SUNSI.
A	If access granted: Issuance of presiding officer or other designated officer decision on motion for protective order for access to sensitive information (including schedule for providing access and submission of contentions) or decision reversing a final adverse determination by the NRC staff.
A + 3 ..	Deadline for filing executed Non-Disclosure Affidavits. Access provided to SUNSI consistent with decision issuing the protective order.
A + 28	Deadline for submission of contentions whose development depends upon access to SUNSI. However, if more than 25 days remain between the petitioner's receipt of (or access to) the information and the deadline for filing all other contentions (as established in the notice of hearing or opportunity for hearing), the petitioner may file its SUNSI contentions by that later deadline.
A + 53	(Contention receipt +25) Answers to contentions whose development depends upon access to SUNSI.
A + 60	(Answer receipt +7) Petitioner/Intervenor reply to answers.
>A + 60	Decision on contention admission.

[FR Doc. 2011–11222 Filed 5–6–11; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

Advisory Committee on Reactor Safeguards Meeting of the ACRS Subcommittee on EPR; Cancellation to May 11, 2011, ACRS Meeting—Federal Register Notice

The **Federal Register** Notice for the ACRS Subcommittee Meeting on the design certification application review of the U.S. Evolutionary Power Reactor scheduled to be held on May 11, 2011, is being canceled.

The notice of this meeting was previously published in the **Federal Register** on Wednesday, Monday, April 25, 2011 [75 FR 22935].

Further information regarding this meeting can be obtained by contacting Derek Widmayer, Designated Federal Official (*Telephone:* 301–415–7366, *E-mail*: *Derek.Widmayer@nrc.gov*) between 7:30 a.m. and 5:15 p.m. (ET).

Dated: May 3, 2011.

Yoira Diaz-Sanabria,

Acting Chief, Reactor Safety Branch B, Advisory Committee on Reactor Safeguards.

[FR Doc. 2011–11223 Filed 5–6–11; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[NRC–2011–0006]

Sunshine Act Meeting Notice

AGENCY HOLDING THE MEETINGS: Nuclear Regulatory Commission.

DATES: Weeks of May 9, 16, 23, 30, June 6, 13, 20, 2011.

PLACE: Commissioners' Conference Room, 11555 Rockville Pike, Rockville, Maryland.

STATUS: Public and Closed.

Week of May 9, 2011

Thursday, May 12, 2011

9:30 a.m.—Briefing on the Progress of the Task Force Review of NRC Processes and Regulations Following the Events in Japan (Public Meeting) (*Contact:* Nathan Sanfilippo, 301–415–3951).

This meeting will be webcast live at the Web address—*http://www.nrc.gov.*

Week of May 16, 2011—Tentative

There are no meetings scheduled for the week of May 16, 2011.

Week of May 23, 2011—Tentative

Friday, May 27, 2011

9 a.m.—Briefing on Results of the Agency Action Review Meeting (AARM) (Public Meeting) (*Contact:* Rani Franovich, 301–415–1868).

This meeting will be webcast live at the Web address—*http://www.nrc.gov.*

Week of May 30, 2011—Tentative

Thursday, June 2, 2011

9:30 a.m.—Briefing on Human Capital and Equal Employment Opportunity (EEO) (Public Meeting) (*Contact:* Susan Salter, 301–492–2206).

This meeting will be webcast live at the Web address—*http://www.nrc.gov.*

Week of June 6, 2011—Tentative

Monday, June 6, 2011

10 a.m.—Meeting with the Advisory Committee on Reactor Safeguards (ACRS) (Public Meeting) (*Contact:* Tanny Santos, 301–415–7270).

This meeting will be webcast live at the Web address—*http://www.nrc.gov.*

Week of June 13, 2011—Tentative

Thursday, June 16, 2011

9:30 a.m.—Briefing on the Progress of the Task Force Review of NRC Processes and Regulations Following Events in Japan (Public Meeting) (*Contact:* Nathan Sanfilippo, 301–415–3951).

This meeting will be webcast live at the Web address—*http://www.nrc.gov.*

Week of June 20, 2011—Tentative

There are no meetings scheduled for the week of June 20, 2011.

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* The schedule for Commission meetings is subject to change on short notice. To verify the status of meetings, call (recording)—(301) 415–1292. Contact person for more information: Rochelle Bavol, (301) 415–1651.

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The NRC Commission Meeting Schedule can be found on the Internet at: *http://www.nrc.gov/public-involve/public-meetings/schedule.html.*

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The NRC provides reasonable accommodation to individuals with disabilities where appropriate. If you need a reasonable accommodation to participate in these public meetings, or need this meeting notice or the transcript or other information from the public meetings in another format (*e.g.,* Braille, large print), please notify Bill Dosch, Chief, Work Life and Benefits Branch, at 301–415–6200, *TDD:* 301–415–2100, or by e-mail at *william.dosch@nrc.gov.* Determinations on requests for reasonable accommodation will be made on a case-by-case basis.

* * * * *

This notice is distributed electronically to subscribers. If you no longer wish to receive it, or would like to be added to the distribution, please contact the Office of the Secretary, Washington, DC 20555 (301–415–1969), or send an e-mail to *darlene.wright@nrc.gov.*

Dated: May 4, 2011.

Richard J. Laufer,

Technical Coordinator, Office of the Secretary.

[FR Doc. 2011–11350 Filed 5–5–11; 4:15 pm]

BILLING CODE 7590–01–P

SECURITIES AND EXCHANGE COMMISSION

Submission for OMB Review; Comment Request

Upon Written Request, Copies Available From: Securities and Exchange Commission, Office of Investor Education and Advocacy, Washington, DC 20549–0213.

Extension:

Electronic Data Collection System; OMB Control No. 3235–0672; SEC File No. 270–621.

Notice is hereby given that, pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), the Securities and Exchange Commission ("Commission") is soliciting comments on the new collection of information summarized below. The Commission plans to submit this extension for a current collection of information to the Office of Management and Budget for approval.

The Securities and Exchange Commission has begun the design of a new Electronic Data Collection System database (the Database) and invites comment on the Database that will support information provided by the general public that would like to file a tip or complaint with the Commission. The Database is a web based e-filed dynamic report based on technology that pre-populates and establishes a series of questions based on the data that the individual enters. The individual will then complete specific information on the subject(s) and nature of the suspicious activity, using the data elements appropriate to the type of complaint or subject. The first phase of the Database was released as a pilot in March 2011. Any public suggestions that are received during the pilot phase will be reviewed and changes will be considered. The final version will be available Fall 2011. There are no costs associated with this collection. The public interface to the Database is available using the *Tips, Complaints and Referrals Portal.* Information is provided voluntarily.

Estimated number of annual responses = 25,000.

Estimated annual reporting burden = 12,500 hours (30 minutes per submission).

Written comments are invited on: (a) Whether this collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (b) the accuracy of the agency's estimate of the burden imposed by the collection of information; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology.

Background documentation for this information collection may be viewed at the following Web site, *http://www.reginfo.gov.* Please direct general comments to the following persons: (i) Desk Officer for the Securities and Exchange Commission, Office of Management and Budget, Room 10102, New Executive Office Building, Washington, DC 20503 or send an e-mail to Shagufta Ahmed at *Shagufta_Ahmed@omb.eop.gov;* Thomas Bayer, Chief Information Officer, Securities and Exchange Commission, c/o Remi Pavlik-Simon, 6432 General Green Way, Alexandria, VA 22312; or send an e-mail to: *PRA_Mailbox@sec.gov.* Comments must be submitted within 30 days of this notice.

May 3, 2011.

Cathy H. Ahn,

Deputy Secretary.

[FR Doc. 2011–11189 Filed 5–6–11; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

Sunshine Act Meeting

Notice is hereby given, pursuant to the provisions of the Government in the Sunshine Act, Public Law 94–409, that the Securities and Exchange Commission will hold a Closed Meeting on Thursday, May 12, 2011 at 2 p.m.

Commissioners, Counsel to the Commissioners, the Secretary to the Commission, and recording secretaries will attend the Closed Meeting. Certain staff members who have an interest in the matters also may be present.

The General Counsel of the Commission, or his designee, has certified that, in his opinion, one or more of the exemptions set forth in 5 U.S.C. 552b(c)(3), (5), (7), 9(B) and (10) and 17 CFR 200.402(a)(3), (5), (7), 9(ii) and (10), permit consideration of the scheduled matters at the Closed Meeting.

Commissioner Casey, as duty officer, voted to consider the items listed for the Closed Meeting in a closed session.

The subject matter of the Closed Meeting scheduled for Thursday, May 12, 2011 will be:

Institution and settlement of injunctive actions;

Institution and settlement of administrative proceedings;

Adjudicatory matters; and

Other matters relating to enforcement proceedings.

At times, changes in Commission priorities require alterations in the scheduling of meeting items.

For further information and to ascertain what, if any, matters have been added, deleted or postponed, please contact:

The Office of the Secretary at (202) 551–5400.

Dated: May 5, 2011.

Elizabeth M. Murphy,

Secretary.

[FR Doc. 2011–11422 Filed 5–5–11; 4:15 pm]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–64381; File No. SR–Phlx–2011–57]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by NASDAQ OMX PHLX LLC Relating to Active SQF Port Fees

May 3, 2011.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act") [1] and Rule 19b–4 thereunder,[2] notice is hereby given that, on April 25, 2011, NASDAQ OMX PHLX LLC ("Phlx" or "Exchange") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend Section VI of the Exchange's Fee Schedule pertaining to the Active SQF Port Fee.

While changes to the Fee Schedule pursuant to this proposal are effective upon filing, the Exchange has designated these changes to be operative on May 2, 2011.

The text of the proposed rule change is available on the Exchange's Web site at *http://nasdaqtrader.com/micro.aspx?id=PHLXfilings,* at the principal office of the Exchange, at the Commission's Public Reference Room, and on the Commission's Web site at *http://www.sec.gov.*

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend the Active SQF Port Fee in Section VI of the Exchange's Fee Schedule, titled "Access Service, Cancellation, Membership, Regulatory and Other Fees," in order that the Exchange may provide an equal opportunity to all members to access the Specialized Quote Feed ("SQF") data at a lower cost. Specifically, the Exchange proposes to cap Active SQF Ports at $500 per month for member organizations that meet the following criteria: (i) Are not members of another national securities exchange ("Phlx Only Members"); and (ii) have 50 or less Streaming Quote Trader ("SQT") [3] assignments [4] affiliated with the member organization.

SQF is an interface that enables specialists, SQTs and Remote Streaming Quote Traders ("RSQTs") [5] to connect and send quotes into Phlx XL.[6] Active SQF ports are ports that receive inbound quotes at any time within that month.[7] The Exchange currently assesses the following Active SQF Port Fees:

Number of active SQF ports	Cost per port per month
0–4	$350
5–18	1,250
19–40	2,350
41 and over	3,000

The Exchange currently caps the Active SQF Port Fees at $40,000 per month.[8] The Exchange proposes to cap the Active SQF Port Fee at $500 per month for member organizations that: (i) Are Phlx Only Members, as defined above; and (ii) have 50 or less SQT assignments affiliated with their member organization. All other member organizations would continue to be capped at $40,000 per month. The Exchange proposes to add text to the Fee Schedule to define a Phlx Only Member and indicate which caps apply to which categories and member organizations.

While changes to the Fee Schedule pursuant to this proposal are effective upon filing, the Exchange has designated these changes to be operative on May 2, 2011.

2. Statutory Basis

The Exchange believes that its proposal to amend its Fee Schedule is consistent with Section 6(b) of the Act [9]

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] An SQT is defined in Exchange Rule 1014(b)(ii)(A) as an ROT who has received permission from the Exchange to generate and submit option quotations electronically in options to which such SQT is assigned.

[4] *See* Exchange Rules 1014(b) and 507 for qualifications relating to assignments.

[5] A RSQT is defined in Exchange Rule in 1014(b)(ii)(B) as an ROT that is a member or member organization with no physical trading floor presence who has received permission from the Exchange to generate and submit option quotations electronically in options to which such RSQT has been assigned. An RSQT may only submit such quotations electronically from off the floor of the Exchange.

[6] *See* Securities Exchange Act Release No. 63034 (October 4, 2010), 75 FR 62441 (October 8, 2010) (SR–Phlx 2010–124).

[7] The current version, SQF 6.0, allows member organizations to access, information such as execution reports, execution report messages, auction notifications, and administrative data through a single feed. Other data that is available on SQF 6.0 includes: (1) Options Auction Notifications (*e.g.,* opening imbalance, market exhaust, PIXL or other information currently provided on SQF 5.0); (2) Options Symbol Directory Messages (currently provided on SQF 5.0); (3) System Event Messages (*e.g.,* start of messages, start of system hours, start of quoting, start of opening); (4) Complex Order Strategy Auction Notifications (COLA); (5) Complex Order Strategy messages; (6) Option Trading Action Messages (*e.g.,* trading halts, resumption of trading); and (7) Complex Strategy Trading Action Message (*e.g.,* trading halts, resumption of trading).

[8] This cap expires on November 30, 2011. *See* Securities Exchange Act Release Nos. 63619 (December 29, 2010), 76 FR 614 (January 5, 2011) (SR–Phlx–2010–181); and 63780 (January 26, 2011), 76 FR 5846 (February 2, 2011) (SR–Phlx–2011–07). Also, the Exchange does not assess the above fees to a member organization for the use of SQF 5.0 active ports to the extent that the member organization is paying for the same (or greater) number of SQF 6.0 active ports.

[9] 15 U.S.C. 78f(b).

in general, and furthers the objectives of Section 6(b)(4) of the Act [10] in particular, in that it is an equitable allocation of reasonable fees and other charges among Exchange members and other persons using its facilities.

The Exchange believes that the proposed amendments to the Active SQF Port Fees are equitable, reasonable and not unfairly discriminatory, because the Exchange's member organizations with significantly smaller operations are provided an equal opportunity to be subject to this fee cap. Today, all member organizations are able to cap fees at $40,000, but this $40,000 cap mostly benefits larger Exchange members with greater system usage. The Exchange believes that its proposal should enable smaller Exchange member organizations,[11] defined as Phlx Only Members with 50 or less SQT assignments, to take advantage of the proposed $500 cap and thereby limit costs.

The Exchange believes that this proposal is equitable and reasonable because Phlx Only Members on the Exchange's trading floor are typically one to four person member organizations. Today, less than 3% of the Exchange's market making membership [12] are Phlx Only Members that stream less than 50 options classes. The Exchange believes that the Phlx Only Member qualifier is reasonable because it impacts the segment of the Exchange that is typically a small proprietary market maker doing business on the Exchange's trading floor. The Exchange believes that this qualifier is equitable and not unfairly discriminatory because, as explained below, this is directly related to the member's system usage that directly impacts Exchange costs.

The Exchange also believes that the second qualifier, that the member organization have 50 or less SQT assignments affiliated with their member organization, is equitable and not unfairly discriminatory because a smaller member organization, described above as a Phlx Only Member, typically quotes less than 50 symbols daily, in some cases less. Smaller member organizations generate significantly less quote traffic, as compared to larger, sophisticated member organizations with multiple memberships at other options exchanges and drastically more quote traffic.

The Exchange believes that this proposal is also reasonable because it is consistent with the system usage [13] of smaller versus larger member organizations and therefore allows all member organizations the ability to cap and thereby reduce their Active SQF Port Fees. Smaller member organizations, that only transact business on the Exchange and quote less than 50 symbols, do not utilize system resources to the same extent as a larger member organization. This fee proposal should allow smaller member organizations the opportunity to limit costs by capping fees at $500 and to maintain cost-effective business operations. The proposal is equitable and not unfairly discriminatory because the fees incurred by smaller member organizations would more closely reflect the expenses incurred by the Exchange for their system usage as compared to larger member organizations who use more system resources and are subject to a higher fee cap under the proposal.[14]

The Exchange believes that the two qualifiers which determine the fee cap, (1) being a Phlx Only Member; and (2) quoting less than 50 symbols, are equitable and not unfairly discriminatory because the qualifiers serve to benefit the smaller member organization. The Exchange seeks to provide the smaller member organization an opportunity to take advantage of a fee cap, similar to a larger member organization, given that member organization's business model, which results in less system usage as compared to a larger member organization.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act.[15] At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov.* Please include File Number SR–Phlx–2011–57 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–Phlx-2011–57. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and

[10] 15 U.S.C. 78f(b)(4).

[11] Typically, a smaller member organization currently has between one and six ports depending on certain technology factors.

[12] The Exchange market maker category includes Specialists (*see* Rule 1020) and ROTs (Rule 1014(b)(i) and (ii), which includes SQTs (*see* Rule 1014(b)(ii)(A)) and RSQTs (*see* Rule 1014(b)(ii)(B)).

[13] The Exchange notes that smaller member organizations generally have fewer Active SQF Ports, less robust technology and therefore less system usage. Larger member organizations, generally have multiple affiliations with several options exchanges and more than 50 SQT assignments.

[14] The current cap is in effect until November 30, 2011.

[15] 15 U.S.C. 78s(b)(3)(A)(ii).

printing in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly.

All submissions should refer to File Number SR–Phlx–2011–57 and should be submitted on or before May 31, 2011.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[16]

Cathy H. Ahn,

Deputy Secretary.

[FR Doc. 2011–11193 Filed 5–6–11; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–64386; File No. SR–FINRA–2011–018]

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing of Proposed Rule Change and Amendment No. 1 to Adopt NASD Rule 2830 as FINRA Rule 2341 (Investment Company Securities) in the Consolidated FINRA Rulebook

May 3, 2011.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act") [1] and Rule 19b–4 thereunder,[2] notice is hereby given that on April 19, 2011, Financial Industry Regulatory Authority, Inc. ("FINRA") (f/k/a National Association of Securities Dealers, Inc. ("NASD")) filed with the Securities and Exchange Commission ("SEC" or "Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by FINRA. On May 3, 2011, FINRA filed Amendment No. 1. The Commission is publishing this notice to solicit comments on the proposed rule change, as amended, from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

FINRA is proposing to adopt NASD Rule 2830 (Investment Company Securities) as FINRA Rule 2341 (Investment Company Securities) in the consolidated FINRA rulebook with significant changes. The text of the proposed rule change is available on FINRA's Web site at *http://www.finra.org,* at the principal office of FINRA and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, FINRA included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. FINRA has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

As part of the process of developing a new consolidated rulebook ("Consolidated FINRA Rulebook"),[3] FINRA is proposing to adopt NASD Rule 2830 (Investment Company Securities) as FINRA Rule 2341 (Investment Company Securities) in the Consolidated FINRA Rulebook with significant changes, as discussed below. NASD Rule 2830 regulates members' activities in connection with the sale and distribution of securities of companies registered under the Investment Company Act of 1940 ("investment company securities").[4]

NASD Rule 2830

In connection with the distribution and sale of investment company securities, NASD Rule 2830 limits the sales charges members may receive, prohibits directed brokerage arrangements, limits the payment and receipt of cash and non-cash compensation, sets conditions on discounts to dealers, and addresses other issues such as members' purchases and sales of investment company securities as principal.

Proposed FINRA Rule 2341 would revise the provisions of NASD Rule 2830 in four areas. First, Rule 2341 would require a member to make new disclosures to investors regarding its receipt of or its entering into an arrangement to receive, cash compensation. Second, Rule 2341 would make a minor change to the recordkeeping requirements for non-cash compensation. Third, Rule 2341 would eliminate a condition regarding discounted sales of investment company securities to dealers. Fourth, Rule 2341 would codify past FINRA staff interpretations regarding the purchases and sales of exchange-traded funds ("ETFs"). These proposed changes are discussed in more detail below.

Proposed Changes to the Cash Compensation Disclosure Requirements

NASD Rule 2830(l) governs the payment and acceptance of cash and non-cash compensation in connection with the sale of investment company securities. Among other things, NASD Rule 2830(l)(4) prohibits members from accepting cash compensation from an "offeror" (generally an investment company and its affiliates) unless the compensation is described in the fund's current prospectus. If a member enters into a "special cash compensation" arrangement with an offeror, and the offeror does not make the arrangement available on the same terms to all members that sell the fund's shares, the member's name and the details of the arrangement must be disclosed in the prospectus.[5]

The proposed rule change would modify the disclosure requirements for cash compensation arrangements. As proposed, it would no longer require disclosure of cash compensation arrangements in an investment company's prospectus or SAI. Instead, if within the previous calendar year a member received, or entered into an arrangement to receive, from an offeror any cash compensation other than sales charges and service fees disclosed in the prospectus fee tables of investment

[16] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] The current FINRA rulebook consists of (1) FINRA Rules; (2) NASD Rules; and (3) rules incorporated from NYSE ("Incorporated NYSE Rules") (together, the NASD Rules and Incorporated NYSE Rules are referred to as the "Transitional Rulebook"). While the NASD Rules generally apply to all FINRA members, the Incorporated NYSE Rules apply only to those members of FINRA that are also members of the NYSE ("Dual Members"). The FINRA Rules apply to all FINRA members, unless such rules have a more limited application by their terms. For more information about the rulebook consolidation process, *see Information Notice,* March 12, 2008 (Rulebook Consolidation Process).

[4] As with NASD Rule 2830, FINRA Rule 2341 would not regulate members' activities in connection with variable insurance contracts, which are regulated by FINRA Rule 2320 (Variable Contracts of an Insurance Company).

[5] FINRA staff has interpreted this provision as permitting disclosure in a fund's statement of additional information ("SAI"). *See Notice to Members* 99–55 (July 1999) (Questions and Answers Relating to Non-Cash Compensation Rules), Question #18.

companies sold by the member ("additional cash compensation"), the member would have to make certain disclosures.[6]

FINRA believes that the proposed amendments to the rule would strengthen the rule's requirements regarding cash compensation disclosure and would further inform investors of the potential conflicts that can arise from the sale of investment company securities when a member receives cash compensation other than sales charges and service fees disclosed in the prospectus fee tables of such investment companies.[7] While the current rule prohibits members from selling investment company shares unless certain information regarding cash compensation arrangements is disclosed either in an investment company's prospectus or SAI, it does not impose any disclosure requirements on the member itself. Requiring disclosure of these arrangements, in the detail described below, by the member would enable investors to better evaluate whether a member's particular product recommendation was influenced by these arrangements, and would be an important adjunct to existing suitability, sales practice and disclosure requirements.

First, the member would have to prominently disclose that it has received, or has entered into an arrangement to receive, cash compensation from investment companies and their affiliates, in addition to the sales charges and service fees disclosed in the prospectus fee table. In this context, "cash compensation" would include fees received from an offeror in return for services provided to the offeror, such as sub-administrative and sub-transfer agency fees. Second, the member would have to prominently disclose that this additional cash compensation may influence the selection of investment company securities that the member and its associated persons offer or recommend to investors. Third, the member would have to provide a prominent reference (or in the case of electronically delivered documents, a hyperlink) to a web page or toll-free telephone number where the investor could obtain additional information concerning these arrangements.

For new customers on or after the effective date of the proposed rule change, the member would have to provide these disclosures in paper or electronic form[8] to each such customer prior to the time that the customer first purchases shares of an investment company through the member. For existing customers at the time the proposed rule change becomes effective, the member would have to provide these disclosures in paper or electronic form to each such customer by the later of either: (a) 90 days after the effective date of the proposed rule change, or (b) prior to the time the customer first purchases shares of an investment company through the member after the effective date (other than purchases through reinvestment of dividends or capital distributions or through automatic investment plans).

As discussed above, if a member has received, or entered into an arrangement to receive, additional cash compensation, the member would have to establish a web page or toll-free telephone number through which a customer could obtain additional information concerning the member's cash compensation arrangements. The web page or toll-free telephone number would have to provide:

- A narrative description of the additional cash compensation received from offerors, or to be received pursuant to an arrangement entered into with an offeror, and any services provided, or to be provided, by the member to the offeror or its affiliates for this additional cash compensation;
- If applicable, a narrative description of any preferred list of investment companies to be recommended to customers that the member has adopted as a result of the receipt of additional cash compensation, including the names of the investment companies on this list; and
- The names of the offerors that have paid, or entered into an arrangement with the member to pay, this additional cash compensation to the member.

The member would be required to update this information annually within 90 days after the calendar year end. If this information becomes materially inaccurate between annual updates, the member would have to update it promptly. Also, if a customer specifically requests paper-based disclosure of the information provided through a web page or toll-free telephone number, the member would have to deliver this information to the customer in paper form promptly.

The proposal also would add supplementary material that would clarify the definition of "cash compensation," which would supersede all prior guidance with respect to this definition.[9] The supplementary material would provide that "cash compensation" includes, among other things, revenue sharing paid in connection with the sale and distribution of investment company securities.[10] The supplementary material would specify that "cash compensation" includes revenue sharing payments regardless of whether they are based upon the amount of investment

[6] The terms "sales charge" and "service fees" are defined in NASD Rule 2830 and would retain the same definitions in FINRA Rule 2341. "Sales charge" means "all charges or fees that are paid to finance sales or sales promotion expenses, including front-end, deferred and asset-based sales charges, excluding charges and fees for ministerial, recordkeeping or administrative activities and investment management fees." *See* NASD Rule 2830(b)(8). "Service fees" mean "payments by an investment company for personal service and/or the maintenance of shareholder accounts." *See* NASD Rule 2830(b)(9).

[7] FINRA further notes that, in October 2010, it published a *Regulatory Notice* requesting comment on a concept proposal to require members, at or prior to commencing a business relationship with a retail customer, to provide a written statement to the customer describing the types of accounts and services it provides, as well as conflicts associated with such services and any limitations on the duties the member otherwise owes to retail customers. *See Regulatory Notice* 10–54 (October 2010) (Disclosure of Services, Conflicts and Duties). FINRA staff conceives that the document would include, in the case of investment company securities, the information required by proposed FINRA Rule 2341, but also would include disclosures more broadly as to financial or other incentives, conflicts and limitations on duties, as described in *Regulatory Notice* 10–54.

[8] *See Notice to Members* 98–3 (January 1998) (Electronic Delivery of Information Between Members and Their Customers). This *Notice to Members* provides that members may electronically transmit documents that they are required or permitted to furnish to customers under FINRA rules provided that the members adhere to standards contained in 1995 and 1996 SEC Releases. *See* Securities Act Release No. 7233 (October 6, 1995), 60 FR 53458 (October 13, 1995); Securities Act Release No. 7288 (May 9, 1996), 61 FR 24644 (May 15, 1996). The *Notice to Members* urges members to review these SEC Releases in their entirety to ensure compliance with all aspects of the SEC's electronic delivery requirements.

[9] *See, e.g.,* Securities Exchange Act Release No. 37374 (June 26, 1996), 61 FR 35822 (July 8, 1996) (File No. SR–NASD–95–61; Proposed Rule Change by NASD Relating to the Regulation of Cash and Non-Cash Compensation In Connection With the Sale of Investment Company Securities and Variable Contracts); *Notice to Members* 97–50 (August 1997) (NASD Regulation Requests Comment On Regulation Of Payment And Receipt Of Cash Compensation Incentives) and *Dep't. of Enforcement* v. *Respondent,* Decision No. E8A2003062001, June 28, 2007 (redacted decision) (noting administrative history of current rule).

[10] Revenue sharing payments can take many different forms. For example, an offeror may make a year-end payment to a broker-dealer based on the amount the broker-dealer's customers currently hold in the offeror's funds, or based on the broker-dealer's total sales of the offeror's funds in the previous year. Additionally, revenue sharing payments can take the form of other cash payments, such as a payment by an offeror to help pay the costs of a broker-dealer's annual sales meeting. *See, e.g.,* Securities Act Release No. 8358 (January 24, 2004) [sic], 69 FR 6438 (February 10, 2004) (Confirmation Requirements and Point of Sale Disclosure Requirements for Transactions in Certain Mutual Funds and Other Securities, and Other Confirmation Requirement Amendments, and Amendments to the Registration Form for Mutual Funds) at note 17.

company assets that a member's customers hold, the amount of investment company securities that the member has sold, or any other amount if the payment is related to the sale and distribution of the investment company's securities. As cash compensation, members would be required to disclose such revenue sharing arrangements.

These disclosure requirements would apply only to members that receive or enter into an arrangement to receive additional cash compensation from an offeror. Thus, if a member sells a mutual fund's shares and receives only the sales load and distribution or service fees described in the fund's prospectus fee tables, and does not receive or enter into an arrangement to receive revenue sharing or other additional cash compensation from an offeror, the member would not be required to make the disclosures specified in proposed FINRA Rule 2341(l)(4). Likewise, a principal underwriter of a no-load mutual fund that sells shares directly to investors, and does not receive or enter into an arrangement to receive any cash compensation beyond what is described in the fund's prospectus fee table, would not be subject to the disclosure requirements of paragraph (l)(4).

Proposed Changes to the Non-Cash Compensation Provisions

NASD Rule 2830(l)(5) generally prohibits members and their associated persons from accepting or making payments of non-cash compensation in connection with the sale of investment company securities, subject to certain exceptions. These exceptions allow gifts of under $100, entertainment that does not raise questions of propriety, certain training or education meetings, and sales contests that do not favor particular products.

NASD Rule 2830(l)(3) requires members to keep records of all compensation received by the member or its associated persons from offerors, other than small gifts and entertainment permitted by the rule. Currently, this provision requires the records to include the nature of, and "if known," the value of any non-cash compensation received. FINRA proposes to modify this requirement by deleting the phrase "if known" regarding the value of non-cash compensation. This change would make the provision more consistent with the non-cash compensation recordkeeping requirements in other FINRA rules.[11] The proposal also would add supplementary material that would clarify that, if a member or associated person receives non-cash compensation from an offeror for which a receipt or other documentation of value is unavailable, the member may estimate in good faith the value of such compensation.

Proposed Changes Regarding Conditions for Discounts to Dealers

NASD Rule 2830(c) currently prohibits investment company underwriters from selling the fund's shares to a broker-dealer at a price other than the public offering price unless they meet two requirements:

- The sale must be in conformance with NASD Rule 2420; and
- for certain investment company securities, a sales agreement must be in place that sets forth the concessions paid to the broker-dealer.

The requirement that the sale be in conformance with NASD Rule 2420 is based on historical concerns that both underwriters and dealers of investment company securities be FINRA members. Since the time this provision was adopted, the laws governing broker-dealers have changed, and today virtually all broker-dealers doing business with the public are FINRA members. As a result of this change, the proposal would eliminate the requirement that the sale be in conformance with NASD Rule 2420.[12]

Proposed Changes Regarding Sales of Shares of ETFs

In recent years, members have bought and sold shares of ETFs, which are open-end management investment companies or unit investment trusts ("UITs") that differ from traditional mutual funds and UITs, since their shares typically are traded on securities exchanges. Because ETF shares are sometimes traded at prices that differ from the fund's current net asset value, ETFs can raise issues under both the Investment Company Act and NASD Rule 2830. For example, Section 22(d) of the Investment Company Act requires dealers to sell shares of an open-end investment company at the current public offering price described in the investment company's prospectus (*i.e.,* the fund's net asset value plus any applicable sales load). Similarly, NASD Rule 2830(i) generally prohibits members from purchasing fund shares at a price lower than the bid price next quoted by or for the issuer (for traditional mutual funds, this price is the fund's next quoted net asset value).

To address these issues, the SEC has issued a series of exemptive orders that allow ETFs to trade on exchanges at prices that differ from the fund's public offering price. The SEC also has proposed a rule that generally would codify the exemptive relief provided by its orders.[13] Similarly, FINRA staff has issued letters interpreting NASD Rule 2830 that allow members to purchase and sell shares of ETFs at prices other than the current net asset value consistent with SEC exemptive orders.[14] The proposal would add a new paragraph, FINRA Rule 2341(o), to codify earlier FINRA staff interpretive letters that permit the trading of ETF shares at prices other than the current net asset value consistent with applicable SEC rules or exemptive orders.

Technical Changes

Paragraph (b)(10) of NASD Rule 2830 incorporates by reference several definitions under the Investment Company Act, including "open-end management investment company." The Investment Company Act does not define the term "open-end management investment company," but does define "management company," and divides this term into two sub-classifications, "open-end company" and "closed-end company."[15]

NASD Rule 2830 employs the terms "open-end investment company" and "open-end management investment company," as well as the term "closed-end investment company." These terms are intended to have the same meanings as "open-end company" and "closed-end company," respectively, under the Investment Company Act. Accordingly, paragraph (b)(10) of proposed FINRA Rule 2341 incorporates the definitions of "open-end company" and "closed-end company" from the Investment Company Act, rather than "open-end management investment company." Likewise, references to these terms within NASD Rule 2830 have been revised in proposed FINRA Rule 2341 to

[11] *See* recordkeeping requirements for non-cash compensation accepted or paid in connection with the distribution or sale of direct participation programs in FINRA Rule 2310(c)(2), variable insurance contracts in FINRA Rule 2320(g)(3), and public offerings of securities in FINRA Rule 5110(h)(2).

[12] FINRA is proposing to replace NASD Rule 2420 with FINRA Rule 2040. *See Regulatory Notice* 09–69 (December 2009) (Payments to Unregistered Persons).

[13] Securities Act Release No. 8901; Investment Company Act Release No. 28193 (March 11, 2008), 73 FR 14618 (March 18, 2008) (Exchange-Traded Funds ("ETFs")).

[14] *See, e.g.,* Letter from Joseph P. Savage, Counsel, Investment Companies Regulation, NASD, to Kathleen H. Moriarty, Esq., Carter, Ledyard & Milburn, dated October 30, 2002, available at *http://www.finra.org/Industry/Regulation/Guidance/InterpretiveLetters/P002680.*

[15] *See* Sections 4(3) and 5(a) of the Investment Company Act.

refer to "open-end companies" and "closed-end companies."

FINRA will announce the implementation date of the proposed rule change no later than 90 days following Commission approval. The implementation date will be no more than 365 days following Commission approval.

2. Statutory Basis

FINRA believes that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act,[16] which requires, among other things, that FINRA rules must be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest. FINRA believes that the proposed rule change will help ensure that investors are informed of potential conflicts of interest that can arise from arrangements related to the sale and distribution of investment company securities.

B. Self-Regulatory Organization's Statement on Burden on Competition

FINRA does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

In June 2009, FINRA published *Regulatory Notice* 09–34 (the "*Notice*") requesting comment on the rule as proposed therein (the "*Notice* proposal"). A copy of the *Notice* is attached as Exhibit 2a. The comment period expired on August 3, 2009. FINRA received nine comments in response to the *Notice.* A list of the commenters in response to the *Notice* is attached as Exhibit 2b, and copies of the comment letters received in response to the *Notice* are attached as Exhibit 2c.[17] A summary of the comments and FINRA's response is provided below. Since almost all of the comments that FINRA received on the proposal concerned its provisions governing receipt of cash compensation, these comments and FINRA's responses thereto are further categorized by subject matter.

Proposal is Premature and Duplicative

Several commenters argued that the proposal regarding cash compensation is premature and duplicative given other legislative and regulatory initiatives that deal with conflicts of interest that can arise in the sale of shares of mutual funds. Schwab noted that the SEC previously had proposed to require broker-dealers to disclose certain conflicts of interest at the point of sale when offering investment company securities.[18] Schwab also cited legislation in Congress that, among other things, would clarify the SEC's authority to promulgate rules requiring that certain information be disclosed prior to the sale of shares of a mutual fund.[19] GWFS and Sutherland cited proposals by the U.S. Department of Labor ("DOL") under the Employee Retirement Income Security Act of 1974, as amended ("ERISA") to require broker-dealers and other service providers to make certain disclosures regarding conflicts of interest to employee benefit pension plans, and proposed regulations to require the disclosure of plan and investment-related information to participants and beneficiaries in participant-directed individual account plans, such as 401(k) plans.[20]

While FINRA is aware of the SEC and the DOL proposals and interim final rule that may address similar issues, FINRA does not believe that the cash compensation provisions are either premature or duplicative of these other rules and rule proposals. The SEC's point-of-sale proposal was initially published for comment in 2004, and re-published for comment in 2005; since then, the SEC has not taken any action on this proposal. Accordingly, FINRA believes that its proposal does not interfere with any recent SEC rulemaking in this area. The DOL proposals and interim final rule focus on disclosures required in connection with the sale of shares of mutual funds to retirement plans and their participants, rather than conflicts that can arise generally when firms sell shares of mutual funds. FINRA believes that the cash compensation provisions of proposed Rule 2341 will complement information that the DOL requires broker-dealers to disclose to plan sponsors and participants. Moreover, the DOL proposal would not cover sales of shares of mutual funds outside of employee pension benefit plans.

Section 919 of the Dodd-Frank Act clarifies the SEC's authority to issue rules that require broker-dealers to provide information to retail investors before purchasing an investment product or service from the broker-dealer.[21] Notwithstanding this provision, FINRA believes that it should proceed with its proposal. Section 919 is not specific to mutual funds, nor does it require the SEC to adopt rules similar to the cash compensation provisions of proposed FINRA Rule 2341. Moreover, FINRA believes its proposal is consistent with the goals of the Dodd-Frank Act to provide greater information concerning potential conflicts of interest to investors.

Proposed Disclosure Is Misleading to Investors

Schwab, GWFS and SIFMA commented that the cash compensation disclosure required by the *Notice* proposal would be misleading to investors. Under the *Notice* proposal, members would have had to disclose to investors, if applicable, that the firm receives cash payments from an offeror other than sales charges or service fees disclosed in the prospectus, the nature of any such cash payments received in the past 12 months, and the name of each offeror that made such payments listed in descending order based on the amount of compensation received from the offeror. These commenters noted that the dollar amounts received by a member would not provide meaningful information to investors absent further

[16] 15 U.S.C. 78*o*–3(b)(6).

[17] *See* Exhibit 2b for a list of abbreviations assigned to commenters. The Commission notes that these exhibits are part of the filing which is available on FINRA's website.

[18] *See* Securities Act Release No. 8358 (January 29, 2004), 69 FR 6438 (February 10, 2004) (Confirmation Requirements and Point of Sale Disclosure Requirements for Transactions in Certain Mutual Funds and Other Securities, and Other Confirmation Requirement Amendments, and Amendments to the Registration Form for Mutual Funds), and Securities Act Release No. 8544 (February 28, 2005), 70 FR 10521 (March 4, 2005) (reopening the comment period on proposed rules, published in January 2004, that would require broker-dealers to provide their customers with information regarding the costs and conflicts of interest that arise from the distribution of mutual fund shares, 529 college savings plan interests, and variable insurance products).

[19] *See* Section 914 of the Investor Protection Act of 2009. *See* U.S. Treasury press release of July 10, 2009, *http://www.treas.gov/press/releases/tg189.htm.* The Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act"), which was signed into law in July 2010, included essentially the same provision cited by Schwab. *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111–203, § 919 (2010).

[20] *See* Reasonable Contract or Arrangement under Section 408(b)(2)—Fee Disclosure, 72 FR 70988 (December 13, 2007) (subsequently codified at 29 C.F.R. pt 2550) ("Reasonable Contract Proposal"), and Fiduciary Requirements for Disclosure in Participant-Directed Individual Account Plans, 73 FR 43014 (July 23, 2008) (subsequently codified at 29 C.F.R. pt 2550). The DOL adopted the Reasonable Contract Proposal as an interim final rule, with request for comments, in July 2010. *See* Reasonable Contract or Arrangement Under Section 408(b)(2)—Fee Disclosure, 75 FR 41600 (July 16, 2010).

[21] *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111–203, § 919 (2010).

explanation, and that such amounts might not indicate that a cash compensation arrangement with one offeror would present greater conflicts than arrangements with other offerors.

Given these concerns, as described in this proposed rule change, FINRA has revised the *Notice* proposal to require what it believes is more meaningful disclosure. As revised, the proposed rule change would require a member to make certain disclosures to new customers in paper or electronic form prior to the time that the customer first purchases shares of an investment company through the member if, within the previous calendar year, it had received or entered into an arrangement to receive cash compensation from any offeror, in addition to sales charges and service fees disclosed in the prospectuses of the funds it sold. The proposed rule change would require that, for existing customers, the member provide these disclosures in paper or electronic form to each such customer by the later of either: (a) 90 days after the effective date of the proposed rule change, or (b) prior to the time the customer first purchases shares of an investment company through the member after the effective date of the proposed rule change (other than purchases through reinvestment of dividends or capital distributions or through automatic investment plans).

The member would have to: Prominently disclose that it receives (or has entered into an arrangement to receive) cash compensation in addition to sales charges and service fees disclosed in the prospectus; prominently disclose that this additional cash compensation may influence the selection of funds that the member and its associated persons offer or recommend; and provide a prominent reference to a web page or toll-free number that provides more information concerning these arrangements. The web page or toll-free number would have to provide a narrative description of the cash compensation the member receives (or will receive), in addition to sales charges and service fees described in the prospectus, and provide the names of offerors that have paid (or will pay) this additional cash compensation. The web page or toll-free number also would have to describe any services provided or to be provided by the member to the offeror or its affiliates for this additional cash compensation. If the member adopts a preferred list of funds to be recommended to customers as a result of the receipt of additional cash compensation, this fact and the names of the funds on the list also would have to be provided.

FINRA believes that, by providing shortened disclosure at the times specified in the proposed rule, members would alert customers to these potential conflicts of interest prior to the time that they decide whether to buy investment company securities through the member. In addition, customers would have the ability to learn more detail about these cash compensation arrangements if they choose through the provided web page or toll-free number. The narrative disclosure provided on a member's web page or toll-free telephone number would disclose these potential conflicts in a more comprehensive and understandable manner. This disclosure would go beyond that proposed in the *Notice* proposal in that it would require members to disclose any arrangements to receive cash compensation in addition to the actual receipt of such compensation. FINRA believes that members subject to the rule's cash compensation disclosure requirements should provide the specified disclosures regarding such arrangements irrespective of whether they have received payment under the arrangement at the time of disclosure. FINRA has eliminated the requirement proposed in the *Notice* proposal to disclose the names of offerors in descending order based on the amount of cash compensation received.

GWFS commented that this disclosure only focuses on payments related to sales of shares of mutual funds, while ignoring conflicts that can arise in connection with the sale of other products, such as collective investment funds or other investments. LPL similarly expressed concern that the proposal discriminates against one product, mutual funds, since it does not require disclosure of cash compensation paid in connection with the sale of other products.

These comments are outside the scope of the proposed rule change. Proposed FINRA Rule 2341 and current NASD Rule 2830 by their terms only apply to the sale of investment company securities. To the extent FINRA should require similar disclosure in connection with the sale of other securities, such requirements would have to be included in rules governing the sale of these products.[22]

Opposition to Prospectus Level Disclosure

The *Notice* proposal would have prohibited members from receiving sales charges and service fees from an offeror unless such compensation is described in the current prospectus for the offeror's investment company. The *Notice* proposal also would have prohibited members from entering into "special sales charges or service fee arrangements" that are not made available on the same terms to all members that distribute the investment company securities of the offeror, unless the name of the member and the details of the arrangement are disclosed in the prospectus. The *Notice* proposal defined "special sales charge or service fee arrangement" as "an arrangement under which a member receives greater sales charges or service fees than other members selling the same investment company securities." The *Notice* proposal then gave examples of such arrangements. The proposed prospectus disclosure was in addition to requirements for members to disclose details about cash compensation arrangements when an account is opened.[23]

A number of commenters objected to the *Notice* proposal's prospectus disclosure requirements. Commenters argued that members will not know if the prospectus disclosure is accurate, since they will not be parties to arrangements between a fund complex and other broker-dealers.[24] ICI noted that investment companies should not be required to make these disclosures, since the information necessary for an investor to make an informed decision about a member's conflicts of interest resides with the member, not the investment company. Commenters also argued that requiring disclosure in a prospectus in addition to requiring a member to provide separate disclosure when an account is opened is fragmented and confusing to investors.[25] In addition, commenters argued that the SEC, rather than FINRA, should determine what information must be provided in an investment company prospectus.[26]

Based on these concerns, FINRA has determined to eliminate the prohibition on receiving cash compensation unless details regarding the arrangement are disclosed in the offeror's investment company prospectuses. As revised in this proposed rule change, the cash compensation disclosures would have to be delivered prior to the time a new customer first purchases investment

[22] *See also Regulatory Notice* 10–54 (Disclosure of Services, Conflicts and Duties), discussed *supra* at note 6.

[23] *See Regulatory Notice* 09–34 (June 2009) (Investment Company Securities).

[24] *See* comment letters from FSI, GWFS, LPL and SIFMA.

[25] *See* comment letters from SIFMA and USAA.

[26] *See* comment letters from LPL and SIFMA.

company securities through the member. The proposed rule change's provisions provide separate requirements for delivery of these disclosures to existing customers.

Burden on Members

Schwab and USAA argued that the cash compensation proposal should not be adopted because the burdens that the proposal imposes on members are not justified given the benefits to investors. FINRA disagrees. With respect to self-regulatory organization rulemaking, the appropriate standard, as stated in the Act, is that the rules do not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. Moreover, FINRA tailors its proposed rule changes as narrowly as possible to achieve the intended and necessary regulatory benefit. As stated in Item 4 of the proposed rule change, FINRA does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. While FINRA recognizes that the proposed rule change may impose some additional burdens on members, FINRA continues to believe that such burdens are necessitated by the benefits to investors in receiving greater transparency as to the potential conflicts of interest that can arise from arrangements related to the sale and distribution of investment company securities.

FSI and SIFMA objected to the *Notice* proposal's requirement to update information contained on a member's web site or toll-free number on a semi-annual basis, arguing that it would be unnecessarily costly and provide little benefit over annual updating. FINRA believes it is important for customers to receive current, accurate disclosures about potential conflicts of interest related to the receipt of additional cash compensation. Accordingly, while FINRA has modified the proposed rule to require annual updating, it also believes that this information should be updated promptly if it becomes materially inaccurate. Thus, as modified, a member would be required to update the disclosures describing additional cash compensation arrangements annually within 90 days after the calendar year end. If this information becomes materially inaccurate between annual updates, it would have to be updated promptly.[27]

[27] FINRA notes that this revised updating requirement closely tracks the SEC's standards for updating the written disclosure statement that investment advisers must provide to clients. *See* Form ADV: General Instructions, Question #4.

Schwab argued the requirement to determine whether a member has received cash compensation other than the sales charges or service fees disclosed in the prospectus is burdensome, particularly if a member operates a mutual fund "supermarket" where payments may come from a combination of Rule 12b-1 fees, sub-administrative fees and advisory fees. FINRA disagrees. The sales charge and service fees amounts that are paid to members must be clearly disclosed in an investment company prospectus. If a member is or will be receiving cash compensation beyond the amounts disclosed in the prospectus fee table, the member must disclose information about these additional payments. FINRA believes that information concerning the pecuniary inducements that may create incentives for broker-dealers to offer or recommend particular investment company securities should be available to investors when making an investment decision and that the importance of this transparency cannot be offset by the number of different investment company securities that a member may choose to offer. If a member is uncertain as to the character of the payments it is or will be receiving, it should err on the side of disclosing the receipt or expected receipt of these payments.

Requests for Clarification

The *Notice* proposal would have required members to disclose the details of any "special sales charge or service fee arrangement" that was not made available on the same terms to all members that distribute an offeror's investment company securities. Schwab, LPL and SIFMA commented that "special sales charge or service fee arrangement," as defined in the *Notice* proposal, was unclear and confusing. The proposed rule change no longer uses this term and has eliminated its definition.

The *Notice* proposal would have required members that receive any form of cash compensation other than sales charges or service fees disclosed in the prospectus to disclose, among other things, that the member receives "cash payments" from an offeror other than such sales charges or service fees. FSI and SIFMA commented that the term "cash payments" is unclear, since it is not defined in the proposal. FINRA has revised this provision to use the defined term "cash compensation" in lieu of "cash payments."

In addition, the proposed rule change includes supplementary information that provides guidance with respect to the definition of "cash compensation." The guidance explains that "cash compensation" includes cash payments commonly known as "revenue sharing" which are typically paid by the investment company's adviser or another affiliate in connection with the distribution of investment company securities. The guidance notes that "cash compensation" includes these payments "whether they are based upon the amount of investment company assets that a member's customers hold, the amount of investment company securities that the member has sold, or any amount if the payment is related to the sale and distribution of the investment company's securities."[28]

The *Notice* stated that revenue sharing payments can take many forms, including an offeror's helping to pay the costs of a firm's annual sales meeting.[29] FSI, LPL and SIFMA all observed that NASD Rule 2830(l)(5)(E) (and proposed FINRA Rule 2341(l)(5)(E)) permit an offeror to contribute money toward a non-cash compensation arrangement between a member and its associated persons, provided that the arrangement meets the criteria in NASD Rule 2830(l)(5)(D) (and proposed FINRA Rule 2341(l)(5)(D)). This provision thus allows an offeror to contribute toward a member's annual sales meeting, provided the sales meeting is a permissible non-cash compensation arrangement, without having to disclose this contribution. These commenters argued that such contributions should not be treated as revenue sharing, given that the industry does not consider such payments to be revenue sharing. SIFMA also commented that the description of "revenue sharing" in the *Notice* conflicts with an SEC definition of the term, citing an SEC enforcement order.[30]

The fact that the Rule, both currently and as proposed, permits an offeror to contribute money toward a member's annual sales meeting (assuming the meeting complies with the requirements for an internal non-cash compensation arrangement) does not preclude the need for a member to disclose these payments as cash compensation. FINRA believes that such payments raise the same conflict-of-interest issues as other forms of revenue sharing, and thus should be disclosed.

FINRA also disagrees with SIFMA's assertion that its description of revenue sharing is inconsistent with the SEC's past definitions of that term. As far as FINRA is aware, the SEC has never defined the term "revenue sharing" in a

[28] *See* proposed FINRA Rule 2341.01.

[29] *See Regulatory Notice* 09–34, at note 8.

[30] *See In the Matter of OppenheimerFunds, Inc. and OppenheimerFunds Distributor, Inc.,* Securities Exchange Act Release No. 52420, 2005 SEC LEXIS 2350 (Sept. 14, 2005).

rule or proposed rule text. The definition cited by SIFMA is used solely in the context of a settled enforcement action between the SEC and a mutual fund investment adviser and its affiliated broker-dealer distributor and, as such, should be considered exclusive to the facts and circumstances discussed in that action. In fact, the SEC has stated separately in the context of its mutual fund point-of-sale disclosure proposal that revenue sharing "may encompass multiple revenue streams" that "not only pose potential conflicts of interest, but also may have the indirect effect of reducing investors' returns by increasing the distribution-related costs incurred by funds."[31] Accordingly, FINRA believes that it is appropriate to require members to disclose receipt of such payments.

As discussed above, the proposed rule change requires the cash compensation disclosures to be delivered prior to the time a new customer first purchases shares of an investment company through the member. The proposed rule change's provisions provide separate requirements for delivery of these disclosures to existing customers. GWFS expressed uncertainty as to whom FINRA considers to be a "customer," particularly where the member sells investment company securities to a retirement plan. FINRA intends that these disclosures be made to the person with whom the member has a customer relationship. If a member sells investment company securities to a retirement plan, the disclosure should be made to the retirement plan sponsor.

The *Notice* proposal would have required disclosure if a member had received additional cash compensation "within the previous 12 months." GWFS and LPL expressed uncertainty as to how this 12-month period would be calculated (*e.g.,* whether it would be a rolling period or based on the calendar year). FINRA has clarified the proposed rule change to require disclosure based on receiving or entering into an arrangement to receive additional cash compensation within the previous calendar year.

ICI and SIFMA inquired whether the cash compensation provisions would require disclosure of the receipt of payments for services, such as sub-administrative or sub-transfer agency fees. The term "cash compensation" is defined broadly to mean "any discount, concession, fee, service fee, commission, asset-based sales charge, loan, override or cash employee benefit received in connection with the sale and distribution of investment company securities." If a member is receiving fees from an offeror for services, such as sub-administrative or sub-transfer agency fees, in connection with the sale and distribution of investment company securities, then proposed FINRA Rule 2341(l)(4)(A) would require the member to disclose the receipt of these fees, since they fall within the definition of "cash compensation." In addition, proposed FINRA Rule 2341(l)(4)(C) would require the member to describe this additional cash compensation and the services provided or to be provided by the member for this additional cash compensation.

The *Notice* proposal would have required a member to disclose "the nature of any such cash payments received in the past 12 months." ICI commented that it is not clear what "the nature of any such payments" means. Schwab and SIFMA recommended that the proposal instead require firms to describe the nature of services they provide to offerors, and the nature of the compensation received.

Based in part on these comments, FINRA revised the cash compensation disclosure provision in several respects. As described above, as proposed, the rule change would require a member that receives, or has entered into an arrangement to receive, cash compensation in addition to sales charges or service fees described in the prospectus within the previous calendar year, to disclose in paper or electronic form to a new customer prior to the time that the customer first purchases shares of an investment company through the member the fact that it receives (or will receive) such compensation. The member would also have to disclose that this additional cash compensation may influence the selection of investment company securities that the member and its associated persons offer or recommend to investors. Further, the member would have to provide a reference to a web page or toll-free telephone number through which a customer could obtain more information concerning the member's cash compensation arrangements. The proposed rule change would require that, for existing customers, the member provide these disclosures in paper or electronic form to each such customer by the later of either: (a) 90 days after the effective date of the proposed rule change, or (b) prior to the time the customer first purchases shares of an investment company through the member after the effective date of the proposed rule change (other than purchases through reinvestment of dividends or capital distributions or through automatic investment plans).

The web page or toll-free number must provide a narrative description of the additional cash compensation received from offerors and any services provided by the member to the offeror or affiliates for this additional compensation. Members will be allowed to use narrative disclosure to explain these arrangements. FINRA believes these revisions will make this provision clearer to members and will provide more meaningful disclosure to investors than that proposed in the *Notice.*

SIFMA inquired how the cash compensation disclosure requirements would apply in the situation in which an introducing broker-dealer and clearing firm share fees paid by an offeror. Assuming the introducing firm sold investment company securities to a customer, the introducing firm would be responsible for disclosing any additional cash compensation it receives from an offeror, even if it shares such additional compensation with a clearing firm. In such a situation, the clearing firm would not be required to make the disclosures under proposed FINRA Rule 2341 to the customer.

SIFMA and FSI also inquired as to the effect of the proposed disclosures on guidance that FINRA previously provided in *Notice to Members* 99–55, Question #15. In that guidance, FINRA addressed a situation in which an offeror reimburses a registered representative's prospecting trip expenses, such as travel, lodging and meals related to meetings with customers, stating that the reimbursement payment would have to be made through the member and disclosed as cash compensation in accordance with NASD Rule 2830(l)(4). Under the proposed rule change, FINRA would consider such payments from an offeror to be additional cash compensation that must be disclosed in accordance with proposed FINRA Rule 2341(l)(4).

Internet Disclosure

In the *Notice,* FINRA requested comment on how the required information should be disclosed to investors, particularly given the availability of the Internet. In particular, FINRA asked whether members should be permitted to deliver initial disclosure information to customers electronically, unless a customer specifically requested paper-based disclosure. Alternatively, FINRA asked whether the rule should

[31] *See* Securities Act Release No. 8358 (January 24, 2004), 69 FR 6438 (February 10, 2004) (Confirmation Requirements and Point of Sale Disclosure Requirements for Transactions in Certain Mutual Funds and Other Securities, and Other Confirmation Requirement Amendments, and Amendments to the Registration Form for Mutual Funds), at notes 17 & 21.

allow firms to provide generalized disclosure to investors when an account is opened regarding the receipt of cash compensation that refers the investor to a Web site address or toll-free telephone number that provides more information.

FSI, GWFS, ICI, LPL and SIFMA all supported revising the proposal to allow web-based disclosure, unless a customer specifically requests paper-based disclosure. FINRA has revised the proposal to allow members to utilize the Internet or a toll-free number to provide more detailed information concerning cash compensation arrangements to investors. FINRA has also specified that if a customer specifically requests paper-based disclosure, the member must deliver this information to the customer in paper form promptly.

Compliance Date

Schwab commented that, if the proposal is adopted, FINRA should give members at least 180 days following adoption to comply with its requirements. FSI and LPL argued for at least 24 months' lead time before requiring firms to comply with the proposal. As stated in Item 2 of the proposed rule change, FINRA will announce the implementation date of the proposed rule change in a *Regulatory Notice* to be published no later than 90 days following Commission approval. The implementation date will be no later than 365 days following Commission approval. In establishing the effective date, FINRA will take into account that firms would need to modify their compliance systems in light of the new required disclosures.

Other Compensation Disclosure Comments

The *Notice* proposal would have required a member to disclose the names of each offeror that paid additional cash compensation, listed in descending order based on the amount of compensation received from each offeror. FSI recommended that the proposal be revised to permit listing offerors in alphabetical order instead. FINRA has revised this provision to eliminate the requirement to list offerors in descending order based on amounts of cash compensation received. As revised, the proposed rule change does not require that offerors be listed in a particular order, as long as the disclosure requirements are met.

ICI recommended that the cash compensation provisions have a *de minimis* threshold below which disclosure of cash compensation payments would not be required. ICI suggested that, if cash compensation payments from a single fund complex represent 1% or less of the aggregate cash compensation received by a member, no disclosure should be required. FINRA does not believe a *de minimis* disclosure threshold is appropriate. Whether particular cash compensation payments create potential conflicts of interest will depend on the surrounding facts and circumstances, and investors should be provided with the opportunity to evaluate the nature of any such conflicts. Accordingly, FINRA believes the rule should require members to disclose any amount of additional cash compensation received from an offeror.

The *Notice* proposal included a paragraph (l)(4)(E) that provided that the disclosure requirements of paragraph (l)(4)(B) of the *Notice* proposal would not apply to cash compensation in the form of sales charges and service fees disclosed in a fund's prospectus fee table.[32] ICI recommended that this paragraph be deleted as redundant given that language in paragraph (l)(4)(B) already excluded this compensation from the disclosure requirements. FINRA agrees and has deleted this paragraph in the proposed rule change.

USAA argued that the cash compensation provisions should exclude members that do not pay their registered representatives direct commissions. FINRA disagrees, since cash compensation arrangements can create potential conflicts of interest even in the absence of a commission-based compensation system for registered representatives. For example, a member may select investment companies to be included on its preferred list based in part on cash compensation received from offerors.

Warner Norcross recommended that the cash compensation provisions be revised to require disclosure at the point of sale of any cash compensation not disclosed in the prospectus. It also recommended that the rule prohibit recommended sales based on payouts and require members to put the interests of customers first. FINRA believes that the proposed rule's disclosure requirements strike a rational balance between providing access to customers of important compensation information that may in part underlie a broker-dealer's decision to offer investment company securities and the efficient delivery of services to customers. FINRA will continue to assess the best mode of all disclosure to customers including assessing whether information access or point of sale disclosure requirements result in greater utilization of disclosure information. With respect to firms' obligations regarding recommendations to customers, FINRA notes that the SEC recently approved new FINRA Rule 2111 (Suitability), which sets forth the basis for determining the suitability of a recommended transaction or investment strategy involving a security or securities.[33]

Non-Cash Compensation Provisions

NASD Rule 2830(l)(3) requires members to keep records of all compensation received by a member or its associated persons from offerors, except for gifts and entertainment permitted by paragraphs (l)(5)(A) and (l)(5)(B). The records must include the names of the offerors, the names of the associated persons, the amount of cash, and the nature and, if known, the value of non-cash compensation received. The *Notice* proposed to eliminate the "if known" qualification for the value of non-cash compensation received.

Schwab, FSI and SIFMA all urged FINRA to add language to the non-cash compensation provisions to expressly permit members to estimate the value of goods and services received for which a receipt or other documentation of value is unavailable. FINRA has added supplementary material to the rule which would expressly permit a member to estimate in good faith the value of non-cash compensation received when a receipt or other documentation of value is unavailable.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 45 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory

[32] The disclosure requirements of paragraph (l)(4)(B) of the *Notice* proposal would now be set forth, as revised, in paragraph (l)(4)(A).

[33] *See Regulatory Notice* 11–02 (January 2011) (SEC Approves Consolidated FINRA Rules Governing Know-Your-Customer and Suitability Obligations). *See also* Securities Exchange Act Release No. 63325 (November 17, 2010), 75 FR 71479 (November 23, 2010) (File No. SR–FINRA–2010–039; Order Granting Accelerated Approval, As Modified by Amendment, to Proposed Rule Change to Adopt FINRA Rules 2090 (Know Your Customer) and 2111 (Suitability) in the Consolidated FINRA Rulebook); Securities Exchange Act Release No. 64260 (April 8, 2011), 76 FR 20759 (April 13, 2011) (File No. SR–FINRA–2011–016; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Delay the Implementation Date of FINRA Rule 2090 (Know Your Customer) and FINRA Rule 2111 (Suitability)).

organization consents, the Commission will:

(A) By order approve or disapprove such proposed rule change, or

(B) institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

• Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or

• Send an e-mail to *rule-comments@sec.gov*. Please include File Number SR–FINRA–2011–018 on the subject line.

Paper Comments

• Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–FINRA–2011–018. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet website (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of FINRA. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make publicly available. All submissions should refer to File Number SR–FINRA–2011–018 and should be submitted on or before May 31, 2011.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[34]

Cathy H. Ahn,

Deputy Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–64383; File No. 4–627]

Short Sale Reporting Study Required by Dodd-Frank Act Section 417(a)(2)

AGENCY: Securities and Exchange Commission.

ACTION: Request for comment.

SUMMARY: The Securities and Exchange Commission ("Commission"), on behalf of its Division of Risk, Strategy, and Financial Innovation ("Division"), is requesting public comment with regard to studies required by the Dodd-Frank Wall Street Reform and Consumer Protection Act of the feasibility, benefits, and costs of requiring reporting in real time, either publicly or, in the alternative, only to the Commission and the Financial Industry Regulatory Authority ("FINRA"), of short sale positions of publicly listed securities, and of conducting a voluntary pilot program in which public companies would agree to have all trades of their shares marked "long," "short," "market maker short," "buy," or "buy-to-cover," and reported as such in real time through the Consolidated Tape.

DATES: Comments should be received on or before June 23, 2011.

ADDRESSES: Comments may be submitted by any of the following methods:

Electronic Comments

• Use the Commission's Internet comment form (*http://www.sec.gov/rules/other.shtml*); or

• Send an e-mail to *rule-comments@sec.gov*. Please include File Number 4–627 on the subject line.

Paper Comments

• Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, U.S. Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number 4–627. To help us process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov*). Comments will also be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. All comments received will be posted without change; we do not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly.

FOR FURTHER INFORMATION CONTACT: Amy Edwards, Assistant Director, Bruce Kraus, Co-Chief Counsel, Lillian Hagen, Special Counsel, Sandra Mortal, Financial Economist, Division of Risk, Strategy, and Financial Innovation, at (202) 551–6655, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–4977.

Discussion:

Under Section 417(a)(2) of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the Dodd-Frank Act),[1] the Commission's Division of Risk, Strategy, and Financial Innovation is required to conduct studies of the feasibility, benefits, and costs of (A) requiring reporting in real time, publicly or, in the alternative, only to the Commission and the Financial Industry Regulatory Authority, short sale positions in publicly listed securities, and (B) conducting a voluntary pilot program in which public companies could agree to have sales of their shares marked "long," "short," or "market maker short," and purchases of their shares marked "buy" or "buy-to-cover," and reported as such in real time through the Consolidated Tape.[2]

In the Division's estimation, data made public by certain self-regulatory organizations ("SROs") indicate that orders marked "short" under current regulations account for nearly 50% of listed equity share volume.[3] Short

[34] 17 CFR 200.30–3(a)(12).

[1] Public Law 111–203 (July 21, 2010).

[2] The term "Consolidated Tape," as used throughout this release, refers to the current reporting systems for transactions in all exchange-listed stocks and ETFs. These systems include Tapes A and B of the Consolidated Tape Plan and Tape C of the Unlisted Trading Privileges or "UTP" Plan. Trades in New York Stock Exchange ("NYSE")-listed securities are reported to Tape A; trades in NYSE–Amex, NYSE–Arca, and regional exchange-listed securities are reported to Tape B; and trades in NASDAQ-listed securities are reported to Tape C. Transactions in unlisted equities, options, or non-equity securities are not currently reported to the Consolidated Tape. For more information *see http://www.nyxdata.com/cta* and *http://www.utpplan.com/*.

[3] This estimate was made by the Division based on short selling volume data for June 2010 made

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selling involves a sale of a security that the seller does not own or a sale that is consummated by the delivery of a security borrowed by, or for the account of, the seller.[4] Typically, the short seller later closes out the position by purchasing equivalent securities on the open market and returning the security to the lender.[5] In general, short selling is used to profit from an expected downward price movement, to provide liquidity in response to unanticipated demand, or to hedge the risk of an economic long position in the same security or in a related security.[6]

To better inform the study required by Section 417(a)(2) of the Dodd-Frank Act, the Commission, on behalf of the Division, seeks comment on both the existing uses of short selling in securities markets and the adequacy or inadequacy of currently available information regarding short sales, as well as comment on the likely effect of these possible future reporting regimes on the securities markets, including their feasibility, benefits, and costs.

The Commission is required to submit a report on the results of these studies to Congress no later than July 21, 2011. All interested parties are invited to submit their views, in writing. Empirical evidence relevant to any part of the Division's study is expressly requested.

I. Baseline

Certain information regarding short sales is currently available to the public. This information includes the total "short interest" in each listed security (*i.e.,* total shares in short positions in that security in all customer and proprietary firm accounts of FINRA member firms), which has been reported twice each month since 2007,[7] as well as data made available more recently on the short selling volume for each listed equity security that is reported on a daily basis,[8] and trade-by-trade short sale transaction data that is released on a delayed (no more than 30 days after the end of the month) basis.[9] Additionally, certain data vendors offer stock lending data, including stock loan volume, lending costs, and the percentage of available stock out on loan, which some market commentators have used as measures of short selling.[10] Further, Section 929X(a) of the Dodd-Frank Act amended Section 13(f) of the Securities Exchange Act of 1934 ("Exchange Act") to require the Commission to adopt rules requiring monthly (or potentially more frequent) public short sale disclosures by security, including the "aggregate amount of the number of short sales of each security, and any additional information determined by the Commission."[11]

Q1. How are currently available data used by issuers, market participants, and others (such as SROs, data vendors, media, analysts, and academics) today? How widely distributed are currently available data? Do costs or other factors limit access to currently available data? Are there other important sources of information as to short sales and short sale positions in addition to those mentioned above?

Q2. The Division understands that equity market makers rely on short selling to facilitate customer buy orders and to ensure that they can maintain two-sided markets without carrying large risky positions. The Division also understands that option market makers frequently sell short to hedge positions taken in the course of market making activities.[12] Why else might market makers sell short? How much of all short selling is accounted for by bona fide market making? Do market makers sell short for purposes other than bona fide market making?[13] Are there ways in which short sales by market makers and other market participants performing similar roles or functions (but that are not subject to some or all of the requirements applicable to market makers) could be viewed as problematic?

Q3. The Commission requests comment on the ways and the extent to which, if any, commenters believe that short selling has been associated with abusive market practices, such as "bear raids" where an equity security is sold short in an effort to drive down the security's price by creating an imbalance of sell-side interest?[14] In addition, the Commission requests comment on the ways and extent to which, if any, commenters believe trade-based manipulation (i.e., manipulating without a corporate action or spreading false information)[15] using short sales is possible? Would greater transparency of short positions or short sale transactions help to better deter or prevent such abuses, or assist in additional appropriate actions to prevent them? If so, what new disclosures should be required?

II. Position Reporting

Section 417(a)(2)(A) of the Dodd-Frank Act requires the Division to conduct a study of short "position"

available by SROs. This estimate is consistent with estimates for prior months, and the short percentage varied little from day to day. The underlying data can be found at hyperlinks available at *http://www.sec.gov/answers/shortsalevolume.htm,* and have been provided since August 2009 by the SROs listed therein. As indicated on these hyperlinks, "short selling volume" is the volume of executed orders marked "short" or "short exempt" pursuant to Rule 200(g) of Regulation SHO (which requires broker-dealers to mark all equity sell orders as either "long," "short," or "short-exempt"). *See* 17 CFR 242.200(g). Under current rules, these order marks are not submitted to or reported on the Consolidated Tape, but are maintained as part of broker-dealers' books and records pursuant to Rules 17a–3 and 17a–4. *See* 17 CFR 240.17a–3(a)(5)–(7) and 240.17a–4(b)(8).

[4] *See* 17 CFR 242.200(a).

[5] *See* Exchange Act Release No. 50103 (July 28, 2004), 69 FR 48008 (Aug. 6, 2004) ("Regulation SHO Adopting Release"), available at *http://www.sec.gov/rules/final/34–50103.htm.*

[6] *See, e.g., id.*

[7] *See* FINRA Rule 4560. FINRA member firms must report total shares in short positions in all of their customer and proprietary firm accounts in all equity securities twice per month through FINRA's Web-based Regulation Filing Application ("RFA") system. The short interest data in listed stocks is released by exchanges that list those stocks. Further, FINRA releases the short interest data in unlisted stocks.

[8] *See supra* note 3 for more information on this data and how to obtain it.

[9] These data sets include one observation for each execution involving a short sale and typically date from August 2009. These data sets can be found at hyperlinks available at *http://www.sec.gov/answers/shortsalevolume.htm.*

[10] Data Explorers and SunGard, for example, provide data on securities lending to clients. As some commentators have noted, stock lending facilitates short selling (*see, e.g.,* Speech by Chester Spatt, available at *http://www.sec.gov/news/speech/2007/spch042007css.htm*). As noted above, a number of data vendors sell information as to shares that have been loaned to other investors. Among other things, this information may include volume of loans, lending costs, and the percentage of available stock out on loan. This data offers indirect evidence of short selling, and some research has used stock lending data as a proxy for actual short sales. *See, e.g.,* Oliver Wyman, "The effects of short selling public disclosure of individual positions on equity markets" (Feb. 2011), available at *http://www.oliverwyman.com/ow/pdf_files/OW_EN_FS_Publ_2011_Short_Selling_Public_Disclosure_Equity_Markets.pdf.*

[11] *See* Exchange Act Section 13(f)(2), as amended.

[12] *See, e.g.,* Exchange Act Release No. 58775 (Oct. 14, 2008), 73 FR 61690 (Oct. 17, 2008).

[13] In adopting Regulation SHO, the Commission discussed several activities that are not bona fide market making. Specifically, the Commission stated bona fide market making: (1) "does not include activity that is related to speculative selling strategies or investment purposes of the broker-dealer and is disproportionate to the usual market making patterns or practices of the broker-dealer in that security"; (2) "where a market maker posts continually at or near the best offer, but does not also post at or near the best bid, the market maker's activities would not generally qualify as bona fide market making for purposes of the exception"; and (3) "does not include transactions whereby a market maker enters into an arrangement with another broker-dealer or customer in an attempt to use the market maker's exception for the purpose of avoiding compliance with Rule 203(b)(1) by the other broker-dealer or customer." Exchange Act Release No. 50103, 69 FR 48008, 48015 (Aug. 6, 2004) (citations omitted).

[14] *See, e.g.,* Exchange Act Release No. 61595 (Feb. 26, 2010), 75 FR 11232, 11235 (Mar. 10, 2010).

[15] For a discussion of the theory regarding trade based manipulation, *See* Allen, F. and D. Gale, "Stock Price Manipulation," (1992) *Review of Financial Studies,* 5(3), 503–529.

reporting; the term "position" is not defined in the Exchange Act or in Section 417 of the Dodd-Frank Act. For purposes of this study, the Division plans to use "position" to refer to outstanding holdings at a point in time. Further, Section 417 of the Dodd-Frank Act does not specify a particular level of aggregation and netting, address whose positions would be reported, or indicate whether derivatives or other ways to obtain economic exposure to a stock are covered and existing U.S. regulatory definitions vary in this dimension.[16] "Economic exposure" as used by the Division in this request for comment refers to any financial interest in a company, however acquired. For example, an investor may have economic exposure to a company by owning the stock itself, or through ownership of an index or of derivatives. Likewise, the short sale position reporting requirements in foreign jurisdictions, implemented or proposed, differ from one another in a number of areas with respect to the definition of "position," including inclusion or exclusion of derivatives in the short interest calculation, and reporting of net or gross position. For example, the short interest calculation in Australia[17] and Hong Kong[18] does not or would not include derivatives, whereas the U.K.[19] and a proposal by the European Union (the "E.U. Proposal")[20] both include or would include them. In Australia,[21] the E.U. Proposal,[22] and the U.K.,[23] the reportable position is or would be the net short position, while in Hong Kong, long interest and short positions are calculated separately and are not netted.[24]

Q4. Would real time reporting of the short positions of all investors, intermediaries, and market participants be feasible, and if so, in what ways would it be beneficial? What problems would it address? What would be any reasons, in terms of benefits and costs, for treating short sale position reporting differently than long position reporting? Would "real time" reporting be necessary to achieve these benefits, or is "prompt" updating for material changes in the short position (such as Schedule 13D updating requirements) sufficient?[25] If real time reporting would be beneficial, should "real time" be defined as "continuously updated as soon as practicable," or as frequent "snapshots" of short positions throughout the trading day? Should "as soon as practicable" be defined and, if so, how? If frequent short sale position reporting of some kind would be beneficial, how frequently should such reports be made in order to realize those benefits? Would real time data be more or less accurate than data reported on a delay? Please explain why or why not.

Q5. Who would be likely to use real time short position data, and how? Would the short sale position data be too voluminous to be used directly by investors? Could such data help to detect more easily, better deter, or better prevent short selling abuses? Would market commentators and others use real time short position data to help the public better understand the U.S. securities markets? Would users of real time short position data be able to derive reasonably clear interpretations of the data in real time, and, to the extent they could not, how would the costs and benefits of any reporting regime be affected? Would real time data on short positions help or hinder long-term investors in making "efficient investments?"[26]

Q6. How would real time data on short positions affect the behavior of short sellers and other investors? Would it affect abusive short selling, in particular? To what extent, if any, would such data deter non-abusive short selling? For example, would such data reveal the trading strategies of non-abusive short sellers? Could the availability of such data create new opportunities for unfair or otherwise abusive market practices, such as bear raids or short squeezes? Could real time data on short positions lead to copycat trading?[27] How would real time data on short positions affect investor confidence?

Q7. How would real time data on short positions affect liquidity, volatility, price efficiency, competition, and capital formation? Would real time short position reporting affect equity-related securities markets, such as option or other derivative markets, convertible bond or other debt markets? If so, in what ways?

Q8. How should "position" be defined to help ensure any short sale position reports would be useful in detecting and deterring abusive short sale practices? Should "position" be defined differently to accomplish another purpose? If so, how, and what purpose would such a definition help accomplish? Would there be a trade-off between minimizing incremental implementation costs, above the cost of existing short reporting systems and procedures, in the context of a short position reporting regime and its utility? For maximum utility, should short positions be reported gross, or net of long positions, or in both ways? Should short positions include derivatives and index components? Should short positions be the net economic exposure to a stock across all instruments? Should short positions be defined as in former Rule 10a3–T, in which "the Form SH short position is

[16] FINRA defines a short position as resulting from "short sales" as that term is defined in Rule 200(a) of Regulation SHO, but captures the position as of a settlement date as opposed to a trading date. *See* FINRA Rule 4560. The Commission defined a short selling position in former Rule 10a3–T as "the aggregate gross short sales of an issuer's Section 13(f) securities (excluding options), less purchases to close out a short sale in the same issuer," and stated that "the Form SH short position is not net of long position." *See* Exchange Act Release No. 58785 (Oct. 15, 2008), 73 FR 61678 (Oct. 17, 2008). The reporting requirements of Form SH were in effect from September 22, 2008 to August 1, 2009.

[17] *See* Corporations Regulations 2001 (Commonwealth), regulation 7.9.99(2) (Australia), indicating that the short interest calculation includes securities, managed investment products, and sovereign debentures, stocks or bonds.

[18] *See* Hong Kong Securities and Futures Commission, Consultation Conclusions on Increasing Short Position Transparency (Mar. 2, 2010), available at *http://www.sfc.hk/sfc/doc/EN/speeches/consult/consultationconclusion2march2010english.pdf.*

[19] Short Selling Rules, 2010, FINMAR 2010 (U.K.), ¶ 2.3.6.

[20] The Committee for European Securities Regulators ("CESR") proposed to require that positions be netted at the legal entity level and include all financial instruments that create economic exposure to an issue. *See* CESR, Model for a Pan-European Short Selling Disclosure Regime, CESR/10–088 (Mar. 2010) ("E.U. Model"), at 9.

[21] *See* Corporations Regulations 2001 regulation 7.9.99 (Australia), which states that "a short position is short sales net of long positions."

[22] E.U. Model, at 9.

[23] FINMAR (U.K.), at ¶ 2.3.2.

[24] *See* Hong Kong Securities and Futures Commission, Consultation Conclusions on Increasing Short Position Transparency (Mar. 2, 2010), available at *http://www.sfc.hk/sfc/doc/EN/speeches/consult/consultationconclusion2march2010english.pdf.*

[25] Exchange Act Rule 13d–2 requires that if there is any material change in the facts set forth in a Schedule 13D, including, but not limited to, any material increase or decrease in the percentage of the class beneficially owned, the person required to file the statement must promptly file an amendment disclosing the change. *See* 17 CFR 240.13d–2.

[26] *See, e.g.,* Biagio Bossone, Sandeep Mahajan, and Farah Zahir, *Financial Infrastructure, Group Interests, and Capital Formation* (International Monetary Fund, Working Paper 03/24, 2003), available at *http://www.imf.org/external/pubs/ft/wp/2003/wp0324.pdf.* Efficient investments optimize an investor's utility when trading off expected return and risk. If investors can more accurately estimate expected returns and risk, then they are better able to make efficient investments. For a summary of the underlying theory, *see* Bodie, Kane, and Marcus *Investments,* 7th ed. Chapters 8, 11, and 12.

[27] Copycat trading is a form of "herd behavior," which has been described as "[t]he tendency of investors, like herd animals, to follow the group. Such conformity can give rise to bubbles in individual securities and market sectors." Library of Congress, Federal Research Division, Annotated Bibliography on the Behavioral Characteristics of U.S. Investors (Aug. 2010), available at *http://www.loc.gov/rr/frd/pdf-files/SEC_Annotated-Bibliography.pdf.*

not net of long position?"[28] In the case of broker-dealers, should position reporting be based on existing Regulation SHO aggregation units within broker-dealers,[29] for the broker-dealer taken as a whole, or for its holding company? Please describe the feasibility of any incremental changes to the existing short sale reporting systems that would be necessary to report short sale "positions." Would any potential definitions of short positions be infeasible in real time?

Q9. What would be the benefits and costs of short position reporting if "position" was defined to mean short interest,[30] which would be the aggregate number of shares short in each stock? Would real time public reporting of aggregate short interest be feasible? If so, what problems would it address, and how (and by whom) would this data be used? Should the position reporting to be examined in the Division's study be more comprehensive than the current bi-monthly short interest reporting? For example, "arranged financing" (which would include borrowing from a foreign bank or affiliate to cover short positions) is not currently included in short interest. What would be the impact of including arranged financing in a definition of short position?

Q10. What would be the feasibility, benefits, and costs of real time short position reporting to regulators only, and not to the public? What would the benefits and costs be if this real time reporting information were to be made public on a delayed basis? What length of delay might best balance any benefits and costs?

Q11. Who would be in a position to report short positions in real time? Would broker-dealers be able to accurately report customer short positions in real time? Would anyone else be better suited? Would short sellers themselves be equipped to report their own short positions in real time? Would anyone but the short seller be in a position to report the short seller's short position, whether or not the short position was defined as the short seller's economic position including derivatives? What would be the feasibility of adapting the technology infrastructure that supports existing reporting requirements to support real time short position reporting?

Q12. Who would be in a position to collect and disseminate short positions in real time? Would it be feasible for listing exchanges to collect and disseminate this information? Would a consolidator be better suited to collect this information? What would be the feasibility of adapting the technology infrastructure supporting existing reporting requirements to support real time short position collection and dissemination? Would short position data developed from existing systems be less meaningful than data from a new system designed for this purpose? Why or why not?

Q13. What would be the direct, quantifiable costs of short position reporting for those compiling, reporting, collecting, or disseminating the data? Please differentiate implementation costs from ongoing costs and include opportunity costs. How feasible would it be for brokers, exchanges, and others to create or modify a reporting and dissemination system? What would be the particular technological challenges faced in creating or modifying a reporting and dissemination system? Responses based on the costs of implementing the 2007 modifications to short interest reporting[31] or the 2008 implementation of Form SH[32] are particularly requested.

Q14. How would the establishment of a significant reporting threshold, which would limit short position reporting requirements to holders of significant net short positions, affect costs and the utility of the short position information? If reporting thresholds would be useful, would thresholds at the 5% level used under Section 13(g) of the Exchange Act or the 0.25% level used in former Form SH[33] be appropriate, or would a lower threshold, such as that used in the U.K. model, be preferable?[34] Or would a higher threshold be appropriate? Please explain why or why not. Would thresholds (computed on a net basis) at U.K. levels (or the lower levels being contemplated by the E.U.)[35] capture ordinary course, bona fide market maker positions, or would they tend generally to capture only the positions of investors taking a view as to the stock's future price direction? Would a general exemption from position reporting (or public position reporting) for market makers be appropriate? Why or why not?

Q15. How should experiences with short sale position reporting regimes in foreign jurisdictions[36] inform the analysis of feasibility, benefits, and costs? How relevant are any analyses of other reporting regimes to the Division's study?[37] The Commission requests information on any relevant studies not cited in this request for comment.

III. Transaction Reporting

The Commission requests comment, on behalf of the Division, on the feasibility, benefits, and costs of the Consolidated Tape collecting and disseminating certain transaction marks. Specifically, Section 417(a)(2)(B) of the Dodd-Frank Act requires the Division to study the feasibility, benefits, and costs of conducting a voluntary pilot program in which public companies would agree to have all trades of their shares marked "long," "short," and/or "market maker short" (for the sell portion(s) of the trade), and "buy" and/or "buy to cover" (for the buy portion(s) of the trade) and reported in real time through the Consolidated Tape.

Q16. What benefits, costs, or unintended consequences would flow from adding these transaction marks to the Consolidated Tape? Who would use these marks, and how? Would data from the Consolidated Tape be accessible to the market participants who are most interested in short selling information? Would the Consolidated Tape data be too voluminous to be used directly by

[28] *See supra* note 16.

[29] Rule 200(f) of Regulation SHO permits a broker-dealer, under certain conditions, to calculate its long or short position by independent trading-unit, rather than on a firm-wide basis. 17 CFR 242.200(f).

[30] *See supra* note 7.

[31] *See supra* note 7.

[32] This requirement was instituted via three emergency orders (dated Sep. 18, 2008, Sep. 21, 2008, and Oct. 2, 2008), which implemented Exchange Act Rule 10a–3T (*See* Exchange Act Release No. 58785 (Oct. 15, 2008), 73 FR 61678 (Oct. 17, 2008)). Comments are available at *http://www.sec.gov/comments/s7-31-08/s73108.shtml.*

[33] Certain institutional investment managers were required to report short sales of certain securities on former Form SH unless the short position constituted less than 0.25% of the class of shares and had a fair market value of less than $10,000,000. *See* Exchange Act Release No. 58785 (Oct. 15, 2008), 73 FR 61678 (Oct. 17, 2008).

[34] Two types of short positions must be publicly disclosed in the U.K. A net short position of 0.25% and above of issued capital in a U.K. company involved in a rights issue must be disclosed. In addition, a net short position in a U.K. financial sector company must be disclosed initially when such interest exceeds 0.25% of total share capital, and on an ongoing basis when the position exceeds or falls below 0.25%, 0.35%, 0.45% and 0.55% and each 0.1% threshold thereafter. *See* FINMAR §§ 2.2.1, 2.1.2. *See also* U.K. Financial Services Authority, "Implementing Aspects of the Financial Services Act 2010" (2010), at 2.13.

[35] The E.U. Model would require reporting to regulators when short interest exceeds 0.2% of issued share capital, and reporting to the public when it exceeds 0.5% of issued share capital. *See* E.U. Model, at 8–9.

[36] *See supra* notes 17–24, 34, and 35 for examples.

[37] *See* Oliver Wyman Report, *supra* note 10, and also U.K. Financial Services Authority, Short selling: Feedback on DP09/1, 09/4 (Oct. 2009), available at *http://www.fsa.gov.uk/pubs/discussion/fs09_04.pdf;* European Commission, Impact Assessment on the Proposal for a Regulation of the European Parliament and of the Council on Short Selling and Certain Aspects of Credit Default Swaps, SEC(2010) 1055 (Sep. 15, 2010), available at *http://ec.europa.eu/internal_market/securities/docs/short_selling/20100915_impact_assessment_en.pdf.*

interested market participants? How would the Consolidated Tape marks affect the behavior of short sellers and other investors? Would Consolidated Tape marks help or hinder long-term investors in making "efficient investments?" [38] Would market commentators and others use Consolidated Tape marks to help the public better understand markets? Could such marks help to better detect, deter, or prevent identified short selling abuses? Alternatively, could such marks themselves present opportunities for alleged unfair or otherwise abusive market practices, such as bear raids or short squeezes? Would real time Consolidated Tape marks lead to copycat trading? How would Consolidated Tape marks affect investor confidence?

Q17. Please discuss the feasibility, benefits, and costs related to the "short sale," "market maker short," and "buy-to-cover" marks specifically, and the effects of any choices that would be made when defining such terms. Would there be a trade-off between defining the trades that would be subject to these marks for maximum utility and accuracy to investors, and minimizing implementation costs by building on existing definitions and order marking infrastructure? [39] If so, how should the tension between these goals be best resolved? Would there be any other potential issues associated with the accuracy or clarity of Consolidated Tape marks? Would the Consolidated Tape marks present possibilities for misinterpretation of the data that could impact any benefits and costs?

Q18. How would any additions to Consolidated Tape marks affect liquidity, volatility, price efficiency, competition, and capital formation? To what extent, if any, would such data deter short selling activity not associated with abusive market practices, but that enhances market quality, for example, by revealing trading strategies? What are the consequences of such deterrence? Would any additions to Consolidated Tape marks have consequences (including benefits or costs) for equity-related securities markets, such as options or other derivative markets, convertible bond or other debt markets? If so, please explain. What would the feasibility, benefits, and costs be if this real time reporting information were to be made public on a delayed basis? What length of delay might best balance any benefits and costs?

Q19. What would be the direct, quantifiable costs of adding the additional fields to the Consolidated Tape to support new marks? Please differentiate implementation costs from ongoing costs and include opportunity costs. How feasible would it be for brokers, exchanges, and others to modify order management systems, or other systems, for these marks? What would be the potential technological challenges faced in implementing these marks? Would the Consolidated Tape bear significant implementation or ongoing costs? For example, would capacity requirements be significantly higher? Would vendors and others who receive feeds from the Consolidated Tape bear significant implementation or ongoing costs? Responses based on the costs of implementing Regulation SHO Rule 201,[40] Regulation NMS,[41] and Form SH [42] are particularly requested.

Q20. What would be the benefits and costs (including the direct, quantifiable costs) of conducting a pilot for the Consolidated Tape marking? Would a pilot for Consolidated Tape marking be feasible? Would the direct, quantifiable costs of implementing and maintaining a pilot be any less, or more, than those of implementing and maintaining Consolidated Tape marking on all listed issuers? Would market participants be likely to behave differently during a pilot, for example by hesitating to develop new trading strategies? [43]

Q21. What would be the benefits and costs of the voluntary component of the pilot? What types of issuers would likely volunteer to participate in a pilot? How would this self-selection affect the usefulness of any data derived from a pilot? Are there other consequences from a voluntary pilot? To maximize the utility of any pilot, should the pilot be designed to limit participation in a way that facilitates comparisons of trading in pilot companies and trading in non-pilot companies? If participation should be limited, how should the Commission determine which volunteers to include or exclude from the pilot?

Q22. How should experiences with transaction marking regimes in foreign jurisdictions [44] inform analysis of the feasibility, benefits, and costs? Are there any analyses of transaction marking regimes that are relevant to the Division's study?

Q23. To what extent would Consolidated Tape marks be a substitute or compliment to real time short position reporting? How would the benefits and costs of any Consolidated Tape marks be impacted if real time position reporting existed and vice versa?

Dated: May 3, 2011.

By the Commission.

Elizabeth M. Murphy,

Secretary.

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[38] *See supra* note 26.

[39] *See supra* note 3.

[40] 17 CFR 242.201.

[41] 17 CFR 242.600 *et seq.*

[42] *See supra* note 33.

[43] For example, in 2004, the Commission adopted Rule 202T, which provided for the temporary suspension of the short sale uptick rule in certain securities so that the Commission could study trading behavior in the absence of a price test. *See* Exchange Act Release No. 50103 (July 28, 2004), 69 FR 48008 (Aug. 6, 2004). In the view of Division Staff, Boehmer, Jones, and Zhang provide evidence suggesting that trading behavior may not have completely adjusted to the Regulation SHO Pilot. *See* Boehmer, Jones, and Zhang, "Unshackling Short Sellers: The Repeal of the Uptick Rule" (2008), available at *http://www.gsb.columbia.edu/mygsb/faculty/research/pubfiles/3231/UptickRepealDec11.pdf.*

[44] Several foreign jurisdictions have short sale marking requirements in place including Australia (Australian Securities and Investment Commission, Regulatory Guide, RG 196.12 (April 2010)), Canada (Universal Market Integrity Rules, Rule 3.2), Hong Kong (Hong Kong Exchange Rules, Eleventh Schedule, Rule 5), and Japan (Japan Financial Services Agency, "FSA Extends Temporary Measures Regarding Restrictions on Short Selling and Purchases of Own Stocks by Listed Companies" (Jan. 21, 2011) (effective until Apr. 30, 2011)).

DEPARTMENT OF STATE

[Public Notice 7108]

Advisory Committee for the Study of Eastern Europe and the Independent States of the Former Soviet Union; Notice of Committee Renewal

Renewal of Advisory Committee. The Department of State has renewed the Charter of the Advisory Committee for the Study of Eastern Europe and the Independent States of the Former Soviet Union. This advisory committee makes recommendations to the Secretary of State on funding for applications submitted for the Research and Training Program on Eastern Europe and the Independent States of the Former Soviet Union (Title VIII). These applications are submitted in response to an annual open competition among U.S. national organizations with interest and expertise administering research and training programs in the Russian, Eurasian, and Central and East European fields. The program seeks to build and sustain U.S. expertise on these regions through support for advanced graduate training, language training, and postdoctoral research.

The committee includes representatives of the Secretaries of Defense and Education, the Librarian of

Congress, and the Presidents of the American Association for the Advancement of Slavic Studies and the Association of American Universities. The Assistant Secretary for Intelligence and Research chairs the advisory committee for the Secretary of State. The committee meets at least once annually to recommend grant policies and recipients.

For further information, please call Jon Crocitto, U.S. Department of State, (202) 736–4661.

Dated: May 2, 2011.

Susan H. Nelson,

Executive Director, Advisory Committee for Study of Eastern Europe and Eurasia (the Independent States of the Former Soviet Union).

[FR Doc. 2011–11243 Filed 5–6–11; 8:45 am]

BILLING CODE 4710–32–P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[FMCSA Docket No. FMCSA–2011–0058]

Qualification of Drivers; Exemption Applications; Diabetes Mellitus

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Notice of final disposition.

SUMMARY: FMCSA announces its decision to exempt eighteen individuals from its rule prohibiting persons with insulin-treated diabetes mellitus (ITDM) from operating commercial motor vehicles (CMVs) in interstate commerce. The exemptions will enable these individuals to operate CMVs in interstate commerce.

DATES: The exemptions are effective May 9, 2011. The exemptions expire on May 9, 2013.

FOR FURTHER INFORMATION CONTACT: Dr. Mary D. Gunnels, Director, Medical Programs, (202) 366–4001, *fmcsamedical@dot.gov,* FMCSA, Room W64–224, Department of Transportation, 1200 New Jersey Avenue, SE., Washington, DC 20590–0001. Office hours are from 8:30 a.m. to 5 p.m., Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

Electronic Access

You may see all the comments online through the Federal Document Management System (FDMS) at: *http://www.regulations.gov.*

Docket: For access to the docket to read background documents or comments, go to *http://www.regulations.gov* and/or Room W12–140 on the ground level of the West Building, 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

Privacy Act: Anyone may search the electronic form of all comments received into any of DOT's dockets by the name of the individual submitting the comment (or of the person signing the comment, if submitted on behalf of an association, business, labor union, or other entity). You may review DOT's Privacy Act Statement for the Federal Docket Management System (FDMS) published in the **Federal Register** on January 17, 2008 (73 FR 3316), or you may visit *http://edocket.access.gpo.gov/2008/pdf/E8-785.pdf.*

Background

On March 29, 2011, FMCSA published a notice of receipt of Federal diabetes exemption applications from eighteen individuals and requested comments from the public (76 FR 17476). The public comment period closed on April 28, 2011 and no comments were received.

FMCSA has evaluated the eligibility of the eighteen applicants and determined that granting the exemptions to these individuals would achieve a level of safety equivalent to, or greater than, the level that would be achieved by complying with the current regulation 49 CFR 391.41(b)(3).

Diabetes Mellitus and Driving Experience of the Applicants

The Agency established the current standard for diabetes in 1970 because several risk studies indicated that drivers with diabetes had a higher rate of crash involvement than the general population. The diabetes rule provides that "A person is physically qualified to drive a commercial motor vehicle if that person has no established medical history or clinical diagnosis of diabetes mellitus currently requiring insulin for control" (49 CFR 391.41(b)(3)).

FMCSA established its diabetes exemption program, based on the Agency's July 2000 study entitled "A Report to Congress on the Feasibility of a Program to Qualify Individuals with Insulin-Treated Diabetes Mellitus to Operate in Interstate Commerce as Directed by the Transportation Act for the 21st Century." The report concluded that a safe and practicable protocol to allow some drivers with ITDM to operate CMVs is feasible.

The September 3, 2003 (68 FR 52441) **Federal Register** notice in conjunction with the November 8, 2005 (70 FR 67777) **Federal Register** notice provides the current protocol for allowing such drivers to operate CMVs in interstate commerce.

These eighteen applicants have had ITDM over a range of 1 to 21 years. These applicants report no severe hypoglycemic reactions resulting in loss of consciousness or seizure, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning symptoms, in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the past 5 years. In each case, an endocrinologist verified that the driver has demonstrated a willingness to properly monitor and manage his/her diabetes mellitus, received education related to diabetes management, and is on a stable insulin regimen. These drivers report no other disqualifying conditions, including diabetes-related complications. Each meets the vision standard at 49 CFR 391.41(b)(10).

The qualifications and medical condition of each applicant were stated and discussed in detail in the March 29, 2011, **Federal Register** notice and they will not be repeated in this notice.

Discussion of Comment

FMCSA did not receive any comments in this proceeding.

Basis for Exemption Determination

Under 49 U.S.C. 31136(e) and 31315, FMCSA may grant an exemption from the diabetes standard in 49 CFR 391.41(b)(3) if the exemption is likely to achieve an equivalent or greater level of safety than would be achieved without the exemption. The exemption allows the applicants to operate CMVs in interstate commerce.

To evaluate the effect of these exemptions on safety, FMCSA considered medical reports about the applicants' ITDM and vision, and reviewed the treating endocrinologists' medical opinion related to the ability of the driver to safely operate a CMV while using insulin.

Consequently, FMCSA finds that in each case exempting these applicants from the diabetes standard in 49 CFR 391.41(b)(3) is likely to achieve a level of safety equal to that existing without the exemption.

Conditions and Requirements

The terms and conditions of the exemption will be provided to the applicants in the exemption document and they include the following: (1) That each individual submit a quarterly monitoring checklist completed by the treating endocrinologist as well as an annual checklist with a comprehensive

medical evaluation; (2) that each individual reports within 2 business days of occurrence, all episodes of severe hypoglycemia, significant complications, or inability to manage diabetes; also, any involvement in an accident or any other adverse event in a CMV or personal vehicle, whether or not it is related to an episode of hypoglycemia; (3) that each individual provide a copy of the ophthalmologist's or optometrist's report to the medical examiner at the time of the annual medical examination; and (4) that each individual provide a copy of the annual medical certification to the employer for retention in the driver's qualification file, or keep a copy in his/her driver's qualification file if he/she is self-employed. The driver must also have a copy of the certification when driving, for presentation to a duly authorized Federal, State, or local enforcement official.

Conclusion

Based upon its evaluation of the eighteen exemption applications, FMCSA exempts, Clay B. Anderson, William J. Berzley, David D. Delaney, John A. DelGiudice, Frank A. Dreyfus, Donald L. Erickson, Stefan D. Gall, Robert E. McKenna, Gregory O. Morton, Deron E. Schmidt, Norvald W. Scofield, Jr., Sean L. Shidell, Crispin Tabangcura, Jr., Blake A. Tice, Eric F. Ware, Harold E. Watters, Terry Wilson and John B. Wojcicki from the ITDM standard in 49 CFR 391.41(b)(3), subject to the conditions listed under "Conditions and Requirements" above.

In accordance with 49 U.S.C. 31136(e) and 31315 each exemption will be valid for two years unless revoked earlier by FMCSA. The exemption will be revoked if: (1) The person fails to comply with the terms and conditions of the exemption; (2) the exemption has resulted in a lower level of safety than was maintained before it was granted; or (3) continuation of the exemption would not be consistent with the goals and objectives of 49 U.S.C. 31136(e) and 31315. If the exemption is still effective at the end of the 2-year period, the person may apply to FMCSA for a renewal under procedures in effect at that time.

Issued on: May 2, 2011.

Larry W. Minor,

Associate Administrator of Policy.

[FR Doc. 2011–11148 Filed 5–6–11; 8:45 am]

BILLING CODE 4910–EX–P

DEPARTMENT OF TRANSPORTATION

Maritime Administration

[Docket No. MARAD 2011 0041]

Requested Administrative Waiver of the Coastwise Trade Laws

AGENCY: Maritime Administration, Department of Transportation.

ACTION: Invitation for public comments on a requested administrative waiver of the Coastwise Trade Laws for the vessel CAROLINA BREEZE.

SUMMARY: As authorized by 46 U.S.C. 12121, the Secretary of Transportation, as represented by the Maritime Administration (MARAD), is authorized to grant waivers of the U.S.-build requirement of the coastwise laws under certain circumstances. A request for such a waiver has been received by MARAD. The vessel, and a brief description of the proposed service, is listed below. The complete application is given in DOT docket MARAD–2011–0041 at *http://www.regulations.gov.* Interested parties may comment on the effect this action may have on U.S. vessel builders or businesses in the U.S. that use U.S.-flag vessels. If MARAD determines, in accordance with 46 U.S.C. 12121 and MARAD's regulations at 46 CFR Part 388 (68 FR 23084, April 30, 2003), that the issuance of the waiver will have an unduly adverse effect on a U.S.-vessel builder or a business that uses U.S.-flag vessels in that business, a waiver will not be granted. Comments should refer to the docket number of this notice and the vessel name in order for MARAD to properly consider the comments. Comments should also state the commenter's interest in the waiver application, and address the waiver criteria given in § 388.4 of MARAD's regulations at 46 CFR part 388.

DATES: Submit comments on or before June 8, 2011.

ADDRESSES: Comments should refer to docket number MARAD–2011–0041. Written comments may be submitted by hand or by mail to the Docket Clerk, U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590. You may also send comments electronically via the Internet at *http://www.regulations.gov.* All comments will become part of this docket and will be available for inspection and copying at the above address between 10 a.m. and 5 p.m., E.T., Monday through Friday, except Federal holidays. An electronic version of this document and all documents entered into this docket is available on the World Wide Web at *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Joann Spittle, U.S. Department of Transportation, Maritime Administration, 1200 New Jersey Avenue, SE., Room W21–203, Washington, DC 20590. Telephone 202–366–5979, E-mail *Joann.Spittle@dot.gov.*

SUPPLEMENTARY INFORMATION:

As described by the applicant the intended service of the vessel CAROLINA BREEZE is:
Intended Commercial Use of Vessel: "Casual small groups/small organization tours." *Geographic Region:* "North Carolina."

Privacy Act

Anyone is able to search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, *etc.*). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (Volume 65, Number 70; Pages 19477–78).

By Order of the Maritime Administrator.

Dated: April 19, 2011.

Christine Gurland,

Secretary, Maritime Administration.

[FR Doc. 2011–11168 Filed 5–6–11; 8:45 am]

BILLING CODE 4910–81–P

DEPARTMENT OF TRANSPORTATION

Pipeline and Hazardous Materials Safety Administration

[Docket No. PHMSA–2011–0063]

Pipeline Safety: Request for Special Permit

AGENCY: Pipeline and Hazardous Materials Safety Administration (PHMSA); Department of Transportation (DOT).

ACTION: Notice.

SUMMARY: Pursuant to the Federal pipeline safety laws, PHMSA is re-publishing this notice to clarify the particulars of a special permit request we have received from the Belle Fourche Pipeline Company (Belle Fourche). Belle Fourche is seeking relief from compliance with certain requirements in the Federal pipeline safety regulations. This notice seeks public comments on this request, including comments on any safety or environmental impacts. At the

conclusion of the 30-day comment period, PHMSA will evaluate the request and determine whether to grant or deny a special permit.

DATES: Submit any comments regarding these special permit requests by June 8, 2011.

ADDRESSES: Comments should reference the docket number for the specific special permit request and may be submitted in the following ways:

- *E-Gov Web Site: http://www.Regulations.gov.* This site allows the public to enter comments on any **Federal Register** notice issued by any agency.
- *Fax:* 1–202–493–2251.
- *Mail:* Docket Management System: U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590.
- *Hand Delivery: Docket Management System:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590 between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

Instructions: You should identify the docket number for the special permit request you are commenting on at the beginning of your comments. If you submit your comments by mail, please submit two copies. To receive confirmation that PHMSA has received your comments, please include a self-addressed stamped postcard. Internet users may submit comments at *http://www.Regulations.gov.*

Note: Comments are posted without changes or edits to *http://www.Regulations.gov,* including any personal information provided. There is a privacy statement published on *http://www.Regulations.gov.*

FOR FURTHER INFORMATION CONTACT: *General:* Kay McIver by telephone at 202–366–0113, or e-mail at *kay.mciver@dot.gov.*

Technical: Steve Nanney by telephone at 713–628–7479, or e-mail at *Steve.Nanney@dot.gov.*

SUPPLEMENTARY INFORMATION:

PHMSA has received a request for a special permit from the Belle Fourche Pipeline Company. Belle Fourche seeks relief from compliance with certain pipeline safety regulations. The request includes a technical analysis provided by the operator. The request has been filed at *http://www.Regulations.gov,* and assigned a separate docket number, PHMSA–2010–0300. We invite interested persons to participate by reviewing this special permit request at *http://www.Regulations.gov,* and by submitting written comments, data, or other views. Please include any comments on potential environmental impacts that may result if this special permit is granted.

Before acting on this special permit request, PHMSA will evaluate all comments received on or before the 30-day comment period closing date. Comments will be evaluated after this date if it is possible to do so without incurring additional expense or delay. PHMSA will consider each relevant comment we receive in making our decision to grant or deny a request.

PHMSA has received the following special permit request:

Docket No.	Requester	Regulation(s) affected	Nature of special permit
PHMSA–2010–0300.	Belle Fourche	49 CFR 195.106, 195.112(a)(b), 195.120, 195.200, 195.406(a)(1), and 195.653.	To authorize Belle Fourche an exemption from certain requirements in Subpart A, Subpart C, and Subpart H of 49 CFR Part 195. Belle Fourche seeks exception in two general categories: First for permission to allow flexible steel pipe in Federally regulated service, and second, to adopt the use of requirements and standards appropriate for flexible steel pipes. Belle Fourche further seeks permission to install 4-inch FlexSteel™ pipe into existing 6-inch out-of-service pipelines where feasible. Due to size restrictions, Belle Fourche would not be able to insert the FlexSteel into the 4-inch steel pipe, but proposes to do so along some of the proposed route where there is out-of-service 6-inch steel that would accommodate insertion. Belle Fourche is proposing approximately 14 miles of insertion. This project is for the transport of diesel fuel from Belle Fourche's Hawk Point station to the Arch Coal Mine diesel tank in Campbell County, Wyoming.

Authority: 49 U.S.C. 60118 (c)(1) and 49 CFR 1.53.

Issued in Washington, DC on May 2, 2011.

Jeffrey D. Wiese,

Associate Administrator for Pipeline Safety.

[FR Doc. 2011–11172 Filed 5–6–11; 8:45 am]

BILLING CODE 4910–60–P

DEPARTMENT OF THE TREASURY

Community Development Financial Institutions Fund

Funding Opportunity Title: Notice of Funds Availability (NOFA) Inviting Applications for the FY 2011 Funding Round of the Bank Enterprise Award (BEA) Program

Announcement Type: Announcement of funding opportunity.

Catalog of Federal Domestic Assistance (CDFA) Number: 21.021.

Dates: Applications for the FY 2011 funding round of the BEA Program must be received by June 23, 2011. Applications must meet all eligibility and other requirements and deadlines, as applicable, set forth in this NOFA. Applications received after June 23, 2011 will be rejected.

Executive Summary: Subject to funding availability, this NOFA is issued in connection with the FY 2011 funding round of the BEA Program. The BEA Program is administered by the Community Development Financial Institutions (CDFI) Fund. The BEA Program encourages Insured Depository Institutions to increase their levels of loans, investments, services, and technical assistance within Distressed Communities, and financial assistance to CDFIs through grants, stock purchases, loans, deposits, and other forms of financial and technical assistance, during a specified period.

I. Funding Opportunity Description

A. *Baseline Period and Assessment Period dates:* A BEA Program award is based on an Applicant's increases in Qualified Activities from the Baseline Period to the Assessment Period. For the FY 2011 funding round, the Baseline Period is calendar year 2009 (January 1, 2009 through December 31, 2009), and the Assessment Period is calendar year 2010 (January 1, 2010 through December 31, 2010).

B. *Program regulations:* The regulations governing the BEA Program can be found at 12 CFR part 1806 (the Interim Rule) and provide guidance on evaluation criteria and other requirements of the BEA Program. The CDFI Fund encourages Applicants to review the Interim Rule. Detailed application content requirements are found in the application related to this NOFA. Each capitalized term in this NOFA is more fully defined either in the Interim Rule or the application.

C. *Qualified Activities:* Qualified Activities are defined in the Interim Rule to include CDFI Related Activities, Distressed Community Financing Activities, and Service Activities (12 CFR 1806.103(nn)). CDFI Related Activities include Equity Investments, Equity-Like Loans, and CDFI Support Activities (12 CFR § 1806.103(r)). Distressed Community Financing Activities (12 CFR 1806.103(u)) include Affordable Housing Loans, Affordable Housing Development Loans and related Project Investments; Education Loans; Commercial Real Estate Loans and related Project Investments; Home Improvement Loans; and Small Business Loans and related Project Investments. Service Activities (12 CFR 1806.103(nn)) include Deposit Liabilities, Financial Services, Community Services, Targeted Financial Services, and Targeted Retail Savings/Investment Products.

When calculating BEA Program award amounts, the CDFI Fund will count only the amount that an Applicant reasonably expects to disburse for a Qualified Activity within 12 months from the end of the Assessment Period. Subject to the requirements outlined in Section VII. B.1. of this NOFA, in the case of Commercial Real Estate Loans and CDFI Related Activities, the total principal amount of the transaction must be $10 million or less to be considered a Qualified Activity. Notwithstanding the foregoing, the CDFI Fund, in its sole discretion, may consider transactions with a total principal value of over $10 million, subject to review.

Activities funded with BEA Award dollars or funded to satisfy requirements of the BEA Award Agreement shall not constitute a Qualified Activity for the purposes of calculating or receiving an Award.

D. *Designation of Distressed Community:* Each CDFI Partner that is the recipient of CDFI Support Activities from an Applicant must designate a Distressed Community. CDFI Partners that receive Equity Investments are not required to designate Distressed Communities. Applicants applying for a BEA Program award for carrying out Distressed Community Financing Activities or Service Activities must verify that addresses of both Baseline and Assessment Period activities are in Distressed Communities when completing their application. Please note that a Distressed Community as defined by the BEA Program is not necessarily the same as an Investment Area as defined by the CDFI Program or a Low-Income Community as defined by the New Markets Tax Credit (NMTC) Program.

1. *Definition of Distressed Community:* A Distressed Community must meet certain minimum geographic area and distress requirements, which are defined in the Interim Rule at 12 CFR 1806.103(t) and more fully described in 12 CFR 1806.200.

2. *Designation of Distressed Community:* A CDFI Partner (as appropriate) shall designate an area as a Distressed Community by:

(a) Selecting Geographic Units which individually meet the minimum area eligibility requirements; or

(b) Selecting two or more Geographic Units which, in the aggregate, meet the minimum area eligibility requirements set forth in paragraph (1) of this section provided that no Geographic Unit selected by the Applicant within the area has a poverty rate of less than 20 percent.

A CDFI Partner designates a Distressed Community by submitting a map of the Distressed Community as described in the applicable BEA Program application. CDFI Partners must use the CDFI Fund Information Mapping System (CIMS) to designate Distressed Communities. CIMS is accessed through *myCDFIFund* and contains step-by-step instructions on how to create and print the aforementioned map of the Distressed Community. *MyCDFIFund* is an electronic interface that is accessed through the CDFI Fund's Web site (*http://www.cdfifund.gov*). Instructions for registering with *myCDFIFund* are available on the CDFI Fund's Web site. If you have any questions or problems with registering, please contact the CDFI Fund IT HelpDesk by telephone at (202) 622–2455, or by e-mail to *ITHelpDesk@cdfi.treas.gov.*

II. Award Information

A. *CDFI Applicants:* No CDFI Applicant may receive a FY 2011 Bank Enterprise Award if it has: (1) An application pending for assistance under the FY 2011 round of the Community Development Financial Institutions Program (CDFI Program); (2) Been awarded assistance from the CDFI Fund under the CDFI Program within the 12-month period prior to the date the CDFI Fund selects the Applicant to receive a FY 2011 Bank Enterprise Award; or (3) Ever received assistance under the CDFI Program for the same activities for which it is seeking a FY 2011 Bank Enterprise Award. Please note that Applicants may apply for both a CDFI Program award and a BEA program in FY 2011; however, receiving a FY 2011 CDFI Program award removes an Applicant from eligibility for a FY 2011 BEA Program award.

B. *Award amounts:* Subject to funding availability, the CDFI Fund expects that it may award approximately $22 million for FY 2011 BEA Program awards, in appropriated funds under this NOFA. The CDFI Fund reserves the right to award in excess of said funds under this NOFA, provided that the appropriated funds are available. The CDFI Fund reserves the right to impose a maximum award amount. Under no circumstances will an award be higher than $2 million for any Awardee. The CDFI Fund also reserves the right to impose a minimum award amount. Further, the CDFI Fund reserves the right to fund, in whole or in part, any, all, or none of the applications submitted in response to this NOFA. The CDFI Fund reserves the right to reallocate funds from the amount that is anticipated to be available under this NOFA to other CDFI Fund programs, or reallocate remaining funds to a future BEA Program funding round, if the CDFI Fund determines that the number of awards made under this NOFA is fewer than projected.

When calculating award amounts, the CDFI Fund will count only the amount that an Applicant reasonably expects to disburse on a transaction within 12 months from the end of the Assessment Period.

C. *Types of awards:* BEA Program awards are made in the form of grants.

D. *Notice of Award and Award Agreement:* Each awardee under this NOFA must sign a Notice of Award and an Award Agreement prior to disbursement by the CDFI Fund of

award proceeds. The Notice of Award and the Award Agreement contains the terms and conditions of the Award. For further information, see Section VIII of this NOFA.

III. Eligibility

A. *Eligible Applicants:* Eligible Applicants for the BEA Program must be Insured Depository Institutions, as defined in 12 U.S.C. 1813(c)(2). An Applicant must be FDIC-insured as of December 31, 2010 for the FY 2011 funding round to be eligible for consideration for a BEA Program award under this NOFA. For the purposes of this NOFA, an eligible CDFI Applicant is an Insured Depository Institution that has been certified as a CDFI as of the end of the applicable Assessment Period.

In determining eligibility to receive an Award, the CDFI Fund may take into consideration the views of the appropriate Federal bank regulatory agency, as defined in Section 3 of the Federal Deposit Insurance Act (12 U.S.C. 1813(q)). The CDFI Fund may choose not to approve a BEA award to an Insured Depository Institution Applicant for which the appropriate Federal bank regulatory agency indicates safety and soundness concerns. In addition, the CDFI Fund may take into consideration Community Reinvestment Act (CRA) assessments of Insured Depository Institutions and/or their Affiliates.

1. *Prior awardees:* Applicants must be aware that success in a prior round of any of the CDFI Fund's programs is not indicative of success under this NOFA. For purposes of this section, the CDFI Fund will consider an Affiliate to be any entity that Controls (as such term is defined in paragraph (f) below) the Applicant, is Controlled by the Applicant or is under common Control with the Applicant (as determined by the CDFI Fund) and any entity otherwise identified as an affiliate by the Applicant in its Application under this NOFA. Prior BEA Program Awardees and prior awardees of other CDFI Fund programs are eligible to apply under this NOFA, except as follows:

(a) *Failure to meet reporting requirements:* The CDFI Fund will not consider an application submitted by an Applicant if the Applicant or its Affiliate is a prior CDFI Fund awardee or allocatee under any CDFI Fund program and is not current on the reporting requirements set forth in the previously executed assistance, award or allocation agreement(s), as of the application deadline(s) of this NOFA. Please note that the CDFI Fund only acknowledges the receipt of reports that are complete. As such, incomplete reports or reports that are deficient of required elements will not be recognized as having been received.

(b) *Pending resolution of noncompliance:* If an Applicant that is a prior awardee or allocatee under any CDFI Fund program: (i) Has submitted complete and timely reports to the CDFI Fund that demonstrate noncompliance with a previous assistance, award or allocation agreement, and (ii) the CDFI Fund has yet to make a final determination as to whether the entity is in default of its previous assistance, award or allocation agreement, the CDFI Fund will consider the Applicant's application under this NOFA pending full resolution, in the sole determination of the CDFI Fund, of the noncompliance. Further, if an Affiliate of the Applicant that is a prior CDFI Fund awardee or allocatee under any CDFI Fund program: (i) Has submitted complete and timely reports to the CDFI Fund that demonstrate noncompliance with a previous assistance, award or allocation agreement, and (ii) the CDFI Fund has yet to make a final determination as to whether the entity is in default of its previous assistance, award or allocation agreement, the CDFI Fund will consider the Applicant's application under this NOFA pending full resolution, in the sole determination of the CDFI Fund, of the noncompliance.

(c) *Default status:* The CDFI Fund will not consider an application submitted by an Applicant that is a prior CDFI Fund awardee or allocatee under any CDFI Fund program if, as of the applicable application deadline of this NOFA, the CDFI Fund has made a final determination that such Applicant is in default of a previously executed assistance, award or allocation agreement(s). Further, an entity is not eligible to apply for an award pursuant to this NOFA if, as of the applicable application deadline, the CDFI Fund has made a final determination that an Affiliate of the Applicant: (i) Is a prior CDFI Fund awardee or allocatee under any CDFI Fund program, and (ii) has been determined by the CDFI Fund to be in default of a previously executed assistance, award or allocation agreement(s). Such entities will be ineligible to apply for an award pursuant to this NOFA so long as the Applicant's, or its Affiliate's, prior award or allocation remains in default status or such other time period as specified by the CDFI Fund in writing.

(d) *Termination in default:* The CDFI Fund will not consider an application submitted by an Applicant that is a prior CDFI Fund awardee or allocatee under any CDFI Fund program if, within the 12-month period prior to the application deadline of this NOFA, the CDFI Fund has made a final determination that such Applicant's prior award or allocation terminated in default of the assistance, award or allocation agreement and the CDFI Fund has provided written notification of such determination to such Applicant. Further, an entity is not eligible to apply for an award pursuant to this NOFA if, within the 12-month period prior to the application deadline of this NOFA, the CDFI Fund has made a final determination that an Affiliate of the Applicant is a prior CDFI Fund awardee or allocatee under any CDFI Fund program whose award or allocation terminated in default of the assistance, award or allocation agreement and the CDFI Fund has provided written notification of such determination to the defaulting entity.

(e) *Undisbursed balances:* For the purposes of this section, the term "undisbursed funds" is defined as: (i) In the case of prior BEA Program award(s), any balance of award funds equal to or greater than five (5) percent of the total prior BEA Program award(s) that remains undisbursed more than three (3) years after the end of the calendar year in which the CDFI Fund signed an award agreement with the awardee, and (ii) in the case of prior CDFI Program or other CDFI Fund program award(s), any balance of award funds equal to or greater than five (5) percent of the total prior award(s) that remains undisbursed more than two (2) years after the end of the calendar year in which the CDFI Fund signed an assistance agreement with the awardee.

The term "undisbursed funds" does not include (i) tax credit allocation authority allocated through the New Markets Tax Credit Program; (ii) any award funds for which the CDFI Fund received a full and complete disbursement request from the awardee as of the application deadline of this NOFA; or (iii) any award funds for an award that has been terminated, expired, rescinded, or deobligated by the CDFI Fund.

The CDFI Fund will not consider an application submitted by an Applicant that is a prior CDFI Fund awardee under any CDFI Fund program if the Applicant has a balance of undisbursed funds under said prior award(s), as of the application deadline of this NOFA. Further, an entity is not eligible to apply for an award pursuant to this NOFA if an Affiliate of the Applicant is a prior CDFI Fund awardee under any CDFI Fund program, and has a balance of

undisbursed funds under said prior award(s), as of the application deadline of this NOFA. In the case where an Affiliate of the Applicant is a prior CDFI Fund awardee under any CDFI Fund program, and has a balance of undisbursed funds under said prior award(s), as of the application deadline of this NOFA, the CDFI Fund will include the combined awards of the Applicant and such Affiliates when calculating the amount of undisbursed funds.

(f) *Control:* For purposes of this NOFA, the term "Control" means: (1) Ownership, control, or power to vote 25 percent or more of the outstanding shares of any class of voting securities as defined in 12 CFR 1805.104(mm) of any legal entity, directly or indirectly or acting through one or more other persons; (2) control in any manner over the election of a majority of the directors, trustees, or general partners (or individuals exercising similar functions) of any legal entity; or (3) the power to exercise, directly or indirectly, a controlling influence over the management, credit or investment decisions, or policies of any legal entity.

(g) *Contact the CDFI Fund:* Accordingly, Applicants that are prior awardees and/or allocatees under any CDFI Fund program are advised to: (i) Comply with requirements specified in assistance, award and/or allocation agreement(s), and (ii) contact the CDFI Fund to ensure that all necessary actions are underway for the disbursement of any outstanding balance of a prior award(s). An Applicant that is unsure about the disbursement status of any prior award should contact the CDFI Fund by sending an e-mail to *CDFI.disburseinquiries@cdfi.treas.gov.* All outstanding reports and compliance questions should be directed to Certification, Compliance, Monitoring and Evaluation support by e-mail at *ccme@cdfi.treas.gov;* by telephone at (202) 622–6330; by facsimile at (202) 622–7754; or by mail to CDFI Fund, 601 13th Street, NW., Suite 200 South, Washington, DC 20005. The CDFI Fund will respond to Applicants' reporting, compliance or disbursement questions between the hours of 9 a.m. and 5 p.m. E.T., starting on the date of the publication of this NOFA through June 21, 2011. The CDFI Fund will not respond to Applicants' reporting, compliance or disbursement telephone calls or e-mail inquiries that are received after 5 p.m. E.T. on June 21, 2011 until after the application deadline. The CDFI Fund will respond to technical issues related to myCDFIFund Accounts through 5 p.m. E.T. on June 23, 2011.

2. *Cost sharing and matching fund requirements:* Not applicable.

IV. Application and Submission Information

A. *Application Content Requirements:* Detailed application content requirements are found in the Application related to this NOFA. Applicants must submit all materials described in and required by the Application by the applicable deadlines. Additional information, including instructions relating to the submission of the application via *Grants.gov,* the FY 2011 BEA Signature Page via myCDFIFund, and supporting documentation, is set forth in further detail in the application.

Please note that, pursuant to OMB guidance (68 FR 38402), each Applicant must provide, as part of its Application submission, a Dun and Bradstreet Data Universal Numbering System (DUNS) number. In addition, each Application must include a valid and current Employer Identification Number (EIN), with a letter or other documentation from the Internal Revenue Service (IRS) confirming the EIN. Applicants should allow sufficient time for the IRS and/or Dun and Bradstreet to respond to inquiries and/or requests for identification numbers. An Application that does not include an EIN is incomplete and cannot be transmitted to the CDFI Fund. The preceding sentences do not limit the CDFI Fund's ability to contact an Applicant for the purpose of confirming or clarifying information regarding a DUNS number or EIN number. Once an Application is submitted, the Applicant will not be allowed to change any element of the Application.

As set forth in further detail in the Application, any Qualified Activity missing the required documentation will be disqualified. Applicants will not be allowed to submit missing documentation for Qualified Activities after the Application deadline.

B. *Form of Application Submission:* Applicants must submit applications under this NOFA via Grants.gov with certain required documentation via paper according to the instructions in the application. Applications sent by facsimile or by e-mail will not be accepted, except in circumstances that the CDFI Fund, in its sole discretion, deems acceptable. In order to submit an application via *Grants.gov,* Applicants must complete a multi-step registration process. Applicants are encouraged to allow at least two to three weeks to complete the registration process.

MyCDFIFund Accounts: All Applicants and CDFI Partners must complete a FY 2011 BEA Signature Page in myCDFIFund. All Applicants and CDFI Partners must register User and Organization accounts in myCDFIFund, the CDFI Fund's Internet-based interface by the applicable Application deadline. Failure to register and complete a FY 2011 BEA Signature Page in myCDFIFund could result in the CDFI Fund being unable to accept the application. As myCDFIFund is the CDFI Fund's primary means of communication with Applicants and Awardees, organizations must make sure that they update the contact information in their myCDFIFund accounts. For more information on myCDFIFund, please see the "Frequently Asked Questions" link posted at *https://www.cdfifund.gov/myCDFI/Help/Help.asp.*

Qualified Activity documentation and other attachments as specified in the applicable BEA Program Application must be sent to: Bureau of the Public Debt, CDFI Fund—Awards Management, 3–H, BPD Warehouse & Op Center Dock 1, 257 Bosley Industrial Park Drive, Parkersburg, WV 26101. The telephone number to be used in conjunction with overnight mailings to this address is (304) 480–5450. The CDFI Fund will not accept Applications in its offices in Washington, DC. Applications and attachments received in the CDFI Fund's Washington, DC office will be rejected.

C. *Application Deadlines:* The deadline for receipt of applications via Grants.gov for the FY 2011 funding round is 11:59 p.m. E.T. on June 23, 2011. The deadline for the submission of the FY 2011 BEA Signature Page via myCDFIFund for the FY 2011 funding round is 5 p.m. ET on June 23, 2011. The deadline for receipt of paper documentation at the Bureau of Public Debt address specified above is 5 p.m. E.T., June 23, 2011. Applications and other required documents and other attachments received after the deadline on the applicable date will be rejected. Please note that the document submission deadlines in this NOFA and the funding Application are strictly enforced. The CDFI Fund will not grant exceptions or waivers for late delivery of documents including, but not limited to, late delivery that is caused by third parties such as the United States Postal Service, couriers or overnight delivery services.

V. Intergovernmental Review: Not Applicable

VI. Funding Restrictions: Not Applicable

VII. Application Review Information

A. *CDFI Related Activities:* CDFI Related Activities include Equity Investments, Equity-Like Loans, and CDFI Support Activities provided to eligible CDFI Partners. In addition to regulatory requirements, this NOFA provides the following:

1. *Eligible CDFI Partner:* CDFI Partner is defined as a CDFI that has been provided assistance in the form of CDFI Related Activities by an Applicant (12 CFR 1806.103(p)). For the purposes of this NOFA, an eligible CDFI Partner is an entity that has been certified as a CDFI as of the end of the applicable Assessment Period.

2. *Limitations on eligible Qualified Activities provided to certain CDFI Partners:* An Applicant that is also a CDFI cannot receive credit for any financial assistance or Qualified Activities provided to a CDFI Partner that is also an FDIC-insured depository institution or depository institution holding company.

3. *Certificates of Deposit:* Section 1806.103(r) of the Interim Rule states that any certificate of deposit placed by an Applicant or its Subsidiary in a CDFI that is a bank, thrift, or credit union must be: (i) Uninsured and committed for at least three years; or (ii) insured, committed for a term of at least three years, and provided at an interest rate that is materially below market rates, in the determination of the CDFI Fund.

(a) For purposes of this NOFA, "materially below market interest rate" is defined as an annual percentage rate that does not exceed 100 percent of yields on Treasury securities at constant maturity as interpolated by Treasury from the daily yield curve and available on the Treasury Web site at *http://www.treas.gov/offices/domestic-finance/debt-management/interest-rate/yield.shtml*. For example, for a three-year certificate of deposit, Applicants should use the three-year rate U.S. Government securities, Treasury Yield Curve Rate posted for that business day. The Treasury updates the Web site daily at approximately 5:30 p.m. E.T. Certificates of deposit placed prior to that time may use the rate posted for the previous business day. The annual percentage rate on a certificate of deposit should be compounded quarterly, semi-annually, or annually. In addition, Applicants should determine whether a certificate of deposit is insured based on the total amount that the Applicant or its Subsidiary has on deposit on the day the certificate of deposit is placed. An Applicant must note, in its BEA Program application, whether the certificate of deposit is insured or uninsured.

(b) For purposes of this NOFA, a deposit placed by an Applicant directly with a CDFI Partner that participates in a deposit network or service may be treated as eligible under this NOFA if it otherwise meets the criteria for deposits in 1806.103(r) and the CDFI Partner retains the full amount of the initial deposit or an amount equivalent to the full amount of the initial deposit through a deposit network exchange transaction.

4. *Equity-Like Loans:* An Equity-Like Loan is a loan provided by an Applicant or its Subsidiary to a CDFI, and made on such terms that it has characteristics of an Equity Investment, as such characteristics may be specified by the CDFI Fund (12 CFR 1806.103(z)). For purposes of this NOFA, Equity-Like Loans must meet the following characteristics:

(a) At the end of the initial term, the loan must have a definite rolling maturity date that is automatically extended on an annual basis if the CDFI borrower continues to be financially sound and carry out a community development mission;

(b) Periodic payments of interest and/or principal may only be made out of the CDFI borrower's available cash flow after satisfying all other obligations;

(c) Failure to pay principal or interest (except at maturity) will not automatically result in a default of the loan agreement; and

(d) The loan must be subordinated to all other debt except for other Equity-Like Loans.

Notwithstanding the foregoing, the CDFI Fund reserves the right to determine, in its sole discretion and on a case-by-case basis, whether an instrument meets the above-stated characteristics of an Equity-Like Loan.

5. *CDFI Program Matching Funds:* Equity Investments, Equity-Like Loans, and CDFI Support Activities (except technical assistance) provided by a BEA Applicant to a CDFI and used by the CDFI for matching funds under the CDFI Program are eligible as a qualified activity under the CDFI Related Activity category.

B. Distressed Community Financing Activities and Service Activities: Distressed Community Financing Activities include Affordable Housing Loans, Affordable Housing Development Loans and related Project Investments, Education Loans, Commercial Real Estate Loans and related Project Investments, Home Improvement Loans, and Small Business Loans and related Project Investments (12 CFR 1806.103(u)). In addition to the regulatory requirements, this NOFA provides the following additional requirements:

1. *Commercial Real Estate Loans and related Project Investments:* For purposes of this NOFA, eligible Commercial Real Estate Loans (12 CFR 1806.103(l)) and related Project Investments (12 CFR §§ 1806.103(ll)) are generally limited to transactions with a total principal value of $10 million or less. Notwithstanding the foregoing, the CDFI Fund, in its sole discretion, may consider transactions with a total principal value of over $10 million, subject to review. For such transactions, Applicants must provide a separate narrative, or other information, to demonstrate that the proposed project offers, or significantly enhances the quality of, a facility or service not currently provided to the Distressed Community.

2. *Reporting certain Financial Services:* The CDFI Fund will value the administrative cost of providing certain Financial Services using the following per unit values:

(a) $100.00 per account for Targeted Financial Services;

(b) $50.00 per account for checking and savings accounts that do not meet the definition of Targeted Financial Services;

(c) $5.00 per check cashing transaction;

(d) $25,000 per new ATM installed at a location in a Distressed Community;

(e) $2,500 per ATM operated at a location in a Distressed Community;

(f) $250,000 per new retail bank branch office opened in a Distressed Community; and

(g) In the case of Applicants engaging in Financial Services activities not described above, the CDFI Fund will determine the unit value of such services.

When reporting the opening of a new retail bank branch office, the Applicant must certify that it has not operated a retail branch in the same Distressed Community in which the new retail branch office is being opened in the past three years, and that such new branch will remain in operation for at least the next five years.

Financial Service Activities must be provided by the Applicant to Low- and Moderate-Income Residents. An Applicant may determine the number of Low- and Moderate-Income individuals who are recipients of Financial Services by either: (i) Collecting income data on its Financial Services customers; or (ii)

certifying that the Applicant reasonably believes that such customers are Low- and Moderate-Income individuals and providing a brief analytical narrative with information describing how the Applicant made this determination.

C. *Priority Factors:* Priority Factors are the numeric values assigned to individual types of activity within: (i) the Distressed Community Financing, and (ii) Services categories of Qualified Activities. For the purposes of this NOFA, Priority Factors will be based on the Applicant's asset size as of the end of the Assessment Period (December 31, 2010) as reported by the Applicant in the Application. Asset size classes (*i.e.,* small banks, intermediate-small banks, and large banks) will correspond to the CRA asset size classes set by the four Federal bank regulatory agencies and that were effective as of the end of the Assessment Period. The Priority Factor works by multiplying the change in a Qualified Activity by the assigned Priority Factor to achieve a "weighted value." This weighted value of the change would be multiplied by the applicable award percentage to yield the award amount for that particular activity. For purposes of this NOFA, the CDFI Fund is establishing Priority Factors based on Applicant asset size to be applied to all activity within the Distressed Community Financing Activities and Service Activities categories only, as follows:

CRA Asset size classification	Priority factor
Small banks (assets of less than $274 million as of 12/31/2010)	5.0
Intermediate—small banks (assets of greater than $274 million but less than $1.109 billion as of 12/31/2010)	3.0
Large banks (assets of $1.109 billion or greater as of 12/31/2010)	1.0

D. *Certain Limitations on Qualified Activities:*

1. Low-Income Housing Tax Credits. Financial assistance provided by an Applicant for which the Applicant receives benefits through Low-Income Housing Tax Credits, authorized pursuant to Section 42 of the Internal Revenue Code, as amended (26 U.S.C. 42), shall not constitute an Equity Investment, Project Investment, or other Qualified Activity, for the purposes of calculating or receiving a Bank Enterprise Award.

2. New Markets Tax Credits. Financial assistance provided by an Applicant for which the Applicant receives benefits as an investor in a Community Development Entity that has received an allocation of New Markets Tax Credits, authorized pursuant to Section 45D of the Internal Revenue Code, as amended (26 U.S.C. 45D), shall not constitute an Equity Investment, Project Investment, or other Qualified Activity, for the purposes of calculating or receiving a Bank Enterprise Award.

3. Loan Renewals and Refinances. Financial assistance provided by an Applicant shall not constitute a Qualified Activity, as defined in this part, for the purposes of calculating or receiving an award if, such financial assistances consists of a loan that has matured and is then renewed by the Applicant or consists of a loan that is retired or restructured using the proceeds of a new commitment by the Applicant.

4. Prior BEA Awards. Qualified Activities funded with prior funding round Award dollars or funded to satisfy requirements of the BEA Program Award Agreement shall not constitute a Qualified Activity for the purposes of calculating or receiving an Award.

5. Prior CDFI Program Awards. No CDFI may receive a BEA Program award for activities funded by a CDFI Program award.

E. *Award percentages, award amounts, selection process:* The Interim Rule describes the process for selecting Applicants to receive BEA Program awards and determining award amounts. Applicants will calculate and request an estimated award amount in accordance with a multiple step procedure that is outlined in the Interim Rule (at 12 CFR 1806.202). As outlined in the Interim Rule at 12 CFR1806.203, the CDFI Fund will determine actual award amounts based on the availability of funds, increases in Qualified Activities from the Baseline Period to the Assessment Period, and each Applicant's priority ranking. In calculating the increase in Qualified Activities, the CDFI Fund will determine the eligibility of each transaction for which an Applicant has applied for a BEA Program award. In some cases, the actual award amount calculated by the CDFI Fund may not be the same as the estimated award amount requested by the Applicant.

In the CDFI Related Activities category (except for an Equity Investment or Equity-Like Loan), if an Applicant is a CDFI, such estimated award amount will be equal to 18 percent of the increase in Qualified Activity for the category. If an Applicant is not a CDFI, such estimated award amount will be equal to 6 percent of the increase in Qualified Activity for the category. Notwithstanding the foregoing, for an Applicant that is a CDFI and for an Applicant that is not a CDFI, the award percentage applicable to an Equity Investment, Equity-Like Loan, or Grant in a CDFI shall be 15 percent of the increase in Qualified Activity for the category. For the Distressed Community Financing Activities and Service Activities categories, if an Applicant is a CDFI, such estimated award amount will be equal to 9 percent of the weighted value of the increase in Qualified Activity for the category. If an Applicant is not a CDFI, such estimated award amount will be equal to 3 percent of the weighted value of the increase in Qualified Activity for the category.

If the amount of funds available during the funding round is insufficient for all estimated award amounts, Awardees will be selected based on the process described in the Interim Rule at 12 CFR 1806.203(b). This process gives funding priority to Applicants that undertake activities in the following order: (i) CDFI Related Activities, (ii) Distressed Community Financing Activities, and (iii) Service Activities.

Within each category, Applicants that are certified CDFIs will be ranked first according to the ratio of the actual award amount calculated by the CDFI Fund for the category to the total assets of the Applicant, followed by Applicants that are not certified CDFIs according to the ratio of the actual award amount calculated by the CDFI Fund for the category to the total assets of the Applicant.

The CDFI Fund, in its sole discretion: (i) May adjust the estimated award amount that an Applicant may receive; (ii) may establish a maximum amount that may be awarded to an Applicant; and (iii) reserves the right to limit the amount of an award to any Applicant if the CDFI Fund deems it appropriate.

For purposes of calculating award disbursement amounts, the CDFI Fund will treat Qualified Activities with a total principal amount less than or equal to $250,000 as fully disbursed. For all other Qualified Activities, Awardees will have 12 months from the end of the Assessment Period to make disbursements and 18 months from the end of the Assessment Period to submit to the CDFI Fund disbursement requests for the corresponding portion of their awards, after which the CDFI Fund will rescind and deobligate any outstanding award balance and said outstanding award balance will no longer be available to the Awardee.

The CDFI Fund reserves the right to contact the Applicant to confirm or clarify information. If contacted the Applicant must respond within the CDFI Fund's time parameters or run the risk of being rejected.

The CDFI Fund reserves the right to change its eligibility and evaluation criteria and procedures. If said changes materially affect the CDFI Fund's award decisions, the CDFI Fund will provide information regarding the changes through the CDFI Fund's Web site.

There is no right to appeal the CDFI Fund's award decisions. The CDFI Fund's award decisions are final. The CDFI Fund does not provide debriefings and will only respond to questions regarding an Award decision 30 days prior to the end of the applicable fiscal year.

VIII. Award Administration Information

A. *Notice of Award:* The CDFI Fund will signify its selection of an Applicant as an Awardee by delivering a Notice of Award and Award Agreement to the Applicant. The Notice of Award and Award Agreement will contain the general terms and conditions underlying the CDFI Fund's provision of an award. The Applicant must execute the Notice of Award and Award Agreement and return it to the CDFI Fund. Each Awardee must also provide the CDFI Fund with complete and accurate banking information on the Automated Clearinghouse (ACH) form. The ACH form must be returned with the Notice of Award and Award Agreement.

The CDFI Fund reserves the right, in its sole discretion, to rescind its award, the Notice of Award and Award Agreement if the Awardee fails to return the Notice of Award and Award Agreement signed by the Authorized Representative of the Awardee or any other requested documentation by the deadline set by the CDFI Fund.

By executing a Notice of Award and Award Agreement, the Awardee agrees that, if information (including administrative errors) comes to the attention of the CDFI Fund prior to the Effective Date of the Award Agreement, that either adversely affects the Awardee's eligibility for an award, or adversely affects the CDFI Fund's evaluation of the Awardee's application, or indicates fraud or mismanagement on the part of the Awardee, the CDFI Fund may, in its discretion and without advance notice to the Awardee, terminate the Notice of Award and Award Agreement or take such other actions as it deems appropriate.

1. *Failure to meet reporting requirements:* If an Applicant, or its Affiliate, is a prior CDFI Fund awardee or allocatee under any CDFI Fund program and is not current on the reporting requirements set forth in the previously executed assistance, award or allocation agreement(s), as of the date of the Notice of Award, the CDFI Fund reserves the right, in its sole discretion, to delay entering into an Award Agreement and/or to delay making a disbursement of Award proceeds, until said prior awardee or allocatee is current on the reporting requirements in the previously executed assistance, award or allocation agreement(s). Please note that the CDFI Fund only acknowledges the receipt of reports that are complete. As such, incomplete reports or reports that are deficient of required elements will not be recognized as having been received. If said prior awardee or allocatee is unable to meet this requirement within the timeframe set by the CDFI Fund, the CDFI Fund reserves the right, in its sole discretion, to terminate and rescind the Notice of Award and the Award made under this NOFA.

2. *Pending resolution of noncompliance:* If an Applicant is a prior CDFI Fund awardee or allocatee under any CDFI Fund program and if: (i) It has submitted complete and timely reports to the CDFI Fund that demonstrate noncompliance with a previous assistance, award, or allocation agreement, and (ii) the CDFI Fund has yet to make a final determination regarding whether or not the entity is in default of its previous assistance, award, or allocation agreement, the CDFI Fund reserves the right, in its sole discretion, to delay entering into an Award Agreement and/or to delay making a disbursement of Award proceeds, pending full resolution, in the sole determination of the CDFI Fund, of the noncompliance. Further, if an Affiliate of the Applicant is a prior CDFI Fund awardee or allocatee under any CDFI Fund program, and if such entity: (i) Has submitted complete and timely reports to the CDFI Fund that demonstrate noncompliance with a previous assistance, award, or allocation agreement, and (ii) the CDFI Fund has yet to make a final determination as to whether the entity is in default of its previous assistance, award, or allocation agreement, the CDFI Fund reserves the right, in its sole discretion, to delay entering into an Award Agreement and/or to delay making a disbursement of Award proceeds pending full resolution, in the sole determination of the CDFI Fund, of the noncompliance. If said prior awardee or allocatee is unable to meet this requirement, in the sole determination of the CDFI Fund, the CDFI Fund reserves the right, in its sole discretion, to terminate and rescind the Notice of Award and the Award made under this NOFA.

3. *Default status:* If, at any time prior to entering into an Award Agreement under this NOFA, the CDFI Fund has made a final determination that an Applicant that is a prior CDFI Fund awardee or allocatee under any CDFI Fund program is in default of a previously executed assistance, award, or allocation agreement(s) and has provided written notification of such determination to the Applicant, the CDFI Fund reserves the right, in its sole discretion, to delay entering into an Award Agreement and/or to delay making a disbursement of Award proceeds until said prior awardee or allocatee has submitted a complete and timely report demonstrating full compliance with said Agreement within a timeframe set by the CDFI Fund. Further, if, at any time prior to entering into an Award Agreement under this NOFA, the CDFI Fund has made a final determination that an Affiliate of the Applicant is a prior CDFI Fund awardee or allocatee under any CDFI Fund program, is in default of a previously executed assistance, allocation or award agreement(s), and has provided written notification of such determination to the defaulting entity, the CDFI Fund reserves the right, in its sole discretion, to delay entering into an Award Agreement and/or to delay making a disbursement of Award proceeds until said prior awardee or allocatee has submitted a complete and timely report demonstrating full compliance with said agreement within a timeframe set by the CDFI Fund. If said prior awardee or allocatee is unable to meet this requirement, the CDFI Fund reserves the right, in its sole discretion, to terminate and rescind the Notice of Award and the Award made under this NOFA.

4. *Termination in default:* If, within the 12-month period prior to entering into an Award Agreement under this NOFA, the CDFI Fund has made a final determination that an Applicant that is a prior CDFI Fund awardee or allocatee under any CDFI Fund program whose award or allocation terminated in default of such prior agreement and the CDFI Fund has provided written notification of such determination to such organization, the CDFI Fund reserves the right, in its sole discretion, to delay entering into an Award Agreement and/or to delay making a disbursement of Award proceeds. Further, if, within the 12-month period prior to entering into an Award Agreement under this NOFA, the CDFI Fund has made a final determination that an Affiliate of the Applicant is a prior CDFI Fund awardee or allocatee under any CDFI Fund program, and whose award or allocation terminated in default of such prior agreement(s) and

has provided written notification of such determination to the defaulting entity, the CDFI Fund reserves the right, in its sole discretion, to delay entering into an Award Agreement and/or to delay making a disbursement of Award proceeds.

B. *Award Agreement:* After the CDFI Fund selects an Awardee, unless an exception detailed in this Notice applies, the CDFI Fund and the Awardee will enter into an Award Agreement. The Award Agreement will set forth certain required terms and conditions of the award, which will include, but not be limited to: (i) The amount of the award; (ii) the type of the award; (iii) the approved uses of the award; (iv) performance goals and measures; and (v) reporting requirements for all Awardees. Award Agreements under this NOFA generally will have one-year performance periods. The Award Agreement shall provide that an Awardee shall: (i) Carry out its Qualified Activities in accordance with applicable law, the approved application, and all other applicable requirements; (ii) not receive any monies until the CDFI Fund has determined that the Awardee has fulfilled all applicable requirements, and (iii) use an amount equivalent to the BEA Award amount for BEA Qualified Activities.

C. *Administrative and National Policy Requirements:* Not applicable.

D. *Reporting and Accounting:*

1. *Reporting Requirements:* The CDFI Fund will collect information, on at least an annual basis, from each Awardee that receives an award over $50,000 through this NOFA, which may include, but not limited to, an Annual Report that comprises the following components: (i) Institution Level Report; (ii) Financial Reports (including an OMB A–133 audit, as applicable); and (iii) such other information as the CDFI Fund may require. Each Awardee is responsible for the timely and complete submission of the Annual Report, even if all or a portion of the documents actually is completed by another entity or signatory to the Award Agreement. If such other entities or signatories are required to provide Institution Level Reports, Financial Reports, or other documentation that the CDFI Fund may require, the Awardee is responsible for ensuring that the information is submitted timely and complete. The CDFI Fund reserves the right to contact such additional signatories to the Award Agreement and require that additional information and documentation be provided. The CDFI Fund will use such information to monitor each Awardee's compliance with the requirements set forth in the Award Agreement and to assess the impact of the CDFI Program. All reports must be electronically submitted to the CDFI Fund via the Awardee's myCDFIFund account. The Institution Level Report must be submitted through the CDFI Fund's web-based data collection system, the Community Investment Impact System (CIIS). The Financial Report may be submitted through CIIS. All other components of the Annual Report may be submitted electronically, as directed, by the CDFI Fund. The CDFI Fund reserves the right, in its sole discretion, to modify these reporting requirements if it determines it to be appropriate and necessary; however, such reporting requirements will modified only after notice to Awardees.

2. *Accounting:* The CDFI Fund will require each Awardee that receives an award over $50,000 through this NOFA to account for the use of the award. This will require Awardees to establish administrative and accounting controls, subject to applicable OMB Circulars. The CDFI Fund will provide guidance to Awardees outlining the format and content of the information to be provided on an annual basis, outlining and describing how the funds were used.

IX. Agency Contacts

The CDFI Fund will respond to questions and provide support concerning this NOFA and the funding application between the hours of 9 a.m. and 5 p.m. E.T., starting on the date of the publication of this NOFA through close of business June 21, 2011 for the FY 2011 funding round. The CDFI Fund will not respond to Applicants' reporting, compliance or disbursement telephone calls or e-mail inquiries that are received after 5 p.m. E.T. on June 21, 2011 until after the application deadline. The CDFI Fund will respond to technical issues related to myCDFIFund accounts through 5 p.m. E.T. on June 23, 2011.

Applications and other information regarding the CDFI Fund and its programs may be downloaded and printed from the CDFI Fund's Web site at *http://www.cdfifund.gov*. The CDFI Fund will post on responses to questions of general applicability regarding the BEA Program on its Web site.

A. *Information Technology Support:* Technical support can be obtained by calling (202) 622–2455 or by e-mail at *ithelpdesk@cdfi.treas.gov*. People who have visual or mobility impairments that prevent them from creating a Distressed Community map using the CDFI Fund's Web site should call (202) 622–2455 for assistance. These are not toll free numbers.

B. *Application Support:* If you have any questions about the programmatic or administrative requirements of this NOFA, contact the CDFI Fund's Program office by e-mail at *cdfihelp@cdfi.treas.gov,* by telephone at (202) 622–6355, by facsimile at (202) 622–7754, or by mail at CDFI Fund, 601 13th Street, NW., Suite 200 South, Washington, DC 20005. The number provided is not toll-free.

C. *Certification, Compliance, Monitoring and Evaluation Support:* If you have any questions regarding the compliance requirements of this NOFA, including questions regarding performance on prior awards, contact the CDFI Fund's CCME Unit by e-mail at *ccme@cdfi.treas.gov,* by telephone at (202) 622–6330, by facsimile at (202) 622–7754, or by mail at CDFI Fund, 601 13th Street, NW., Suite 200 South, Washington, DC 20005. The number provided is not toll-free.

D. *Communication with the CDFI Fund:* The CDFI Fund will use its myCDFIFund Internet interface to communicate with Applicants and Awardees under this NOFA. Awardees must use myCDFIFund to submit required reports. The CDFI Fund will notify Awardees by email using the addresses maintained in each Awardee's myCDFIFund account. Therefore, an Awardee and any Subsidiaries, signatories, and Affiliates must maintain accurate contact information (including contact person and authorized representative, email addresses, fax numbers, phone numbers, and office addresses) in their myCDFIFund account(s). For more information about myCDFIFund, please see the Help documents posted at *https://www.cdfifund.gov/myCDFI/Help/Help.asp*.

Authority: 12 U.S.C. 1834a, 4703, 4703 note, 4713; 12 CFR part 1806.

Dated: May 4, 2011.

Donna J. Gambrell,

Director, Community Development Financial Institutions Fund.

[FR Doc. 2011–11264 Filed 5–6–11; 8:45 am]

BILLING CODE 4810–70–P

DEPARTMENT OF THE TREASURY

Bureau of the Public Debt

Proposed Collection: Comment Request

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A). Currently the Bureau of the Public Debt within the Department of the Treasury is soliciting comments concerning the Disclaimer and Consent with Respect to United States Savings Bonds/Notes.

DATES: Written comments should be received on or before July 6, 2011, to be assured of consideration.

ADDRESSES: Direct all written comments to Bureau of the Public Debt, Bruce A. Sharp, 200 Third Street, Avery 4–A, Parkersburg, WV 26106–5312, or e-mail to *Bruce.Sharp@bpd.treas.gov.*

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the form and instructions should be directed to Bruce A. Sharp, Bureau of the Public Debt, 200 Third Street, Avery 4–A, Parkersburg, WV 26106–5312, (304) 480–8150.

SUPPLEMENTARY INFORMATION:

Title: Disclaimer and Consent With Respect To United States Treasury Securities.

OMB Number: 1535–0113.

Form Number: PD F 1849.

Abstract: The information is requested when the requested savings bonds/notes transaction would appear to affect the right, title or interest of some other person.

Current Actions: None.

Type of Review: Extension.

Affected Public: Individuals or households.

Estimated Number of Respondents: 7,000.

Estimated Time per Respondent: 6 minutes.

Estimated Total Annual Burden Hours: 700.

Request For Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Dated: May 2, 2011.

Bruce A. Sharp,

Bureau Clearance Officer.

[FR Doc. 2011–11199 Filed 5–6–11; 8:45 am]

BILLING CODE 4810–39–P

DEPARTMENT OF THE TREASURY

Bureau of the Public Debt

Proposed Collection: Comment Request

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A). Currently the Bureau of the Public Debt within the Department of the Treasury is soliciting comments concerning the Special Form of Assignment for U.S. Registered Definitive Securities.

DATES: Written comments should be received on or before July 6, 2011 to be assured of consideration.

ADDRESSES: Direct all written comments to Bureau of the Public Debt, Bruce A. Sharp, 200 Third Street, Avery 4–A, Parkersburg, WV 26106–5312, or e-mail to *Bruce.Sharp@bpd.treas.gov*

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the form and instructions should be directed to Bruce A. Sharp, Bureau of the Public Debt, 200 Third Street, Avery 4–A, Parkersburg, WV 26106–5312, (304) 480–8150.

SUPPLEMENTARY INFORMATION:

Title: Special Form of Assignment for U.S. Registered Securities.

OMB Number: 1535–0059.

Form Number: PD F 1832.

Abstract: The information is requested to complete transaction involving the assignment of U.S. Registered and Bearer Securities.

Current Actions: None.

Type of Review: Extension.

Affected Public: Individuals or households.

Estimated Number of Respondents: 5,000.

Estimated Time per Respondent: 15 minutes.

Estimated Total Annual Burden Hours: 1,250.

Request For Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Dated: May 2, 2011.

Bruce A. Sharp,

Bureau Clearance Officer.

[FR Doc. 2011–11200 Filed 5–6–11; 8:45 am]

BILLING CODE 4810–39–P

DEPARTMENT OF THE TREASURY

Office of Thrift Supervision

Application Filing Requirements

AGENCY: Office of Thrift Supervision (OTS), Treasury.

ACTION: Notice and request for comment.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to comment on proposed and continuing information collections, as required by the Paperwork Reduction Act of 1995, 44 U.S.C. 3507. The Office of Thrift Supervision within the Department of the Treasury will submit the proposed information collection requirement described below to the Office of Management and Budget (OMB) for review, as required by the Paperwork Reduction Act. Today, OTS is soliciting public comments on its proposal to extend this information collection.

DATES: Submit written comments on or before July 8, 2011.

ADDRESSES: Send comments, referring to the collection by title of the proposal or

by OMB approval number, to Information Collection Comments, Chief Counsel's Office, Office of Thrift Supervision, 1700 G Street, NW., Washington, DC 20552; send a facsimile transmission to (202) 906–6518; or send an e-mail to *infocollection.comments@ots.treas.gov.* OTS will post comments and the related index on the OTS Internet Site at *http://www.ots.treas.gov.* In addition, interested persons may inspect comments at the Public Reading Room, 1700 G Street, NW., by appointment. To make an appointment, call (202) 906–5922, send an e-mail to *public.info@ots.treas.gov,* or send a facsimile transmission to (202) 906–7755.

FOR FURTHER INFORMATION CONTACT: You can request additional information about this proposed information collection from Donald W. Dwyer on (202) 906–6414, Office of Thrift Supervision, 1700 G Street, NW., Washington, DC 20552.

SUPPLEMENTARY INFORMATION: OTS may not conduct or sponsor an information collection, and respondents are not required to respond to an information collection, unless the information collection displays a currently valid OMB control number. As part of the approval process, we invite comments on the following information collection.

Comments should address one or more of the following points:

a. Whether the proposed collection of information is necessary for the proper performance of the functions of OTS;

b. The accuracy of OTS's estimate of the burden of the proposed information collection;

c. Ways to enhance the quality, utility, and clarity of the information to be collected;

d. Ways to minimize the burden of the information collection on respondents, including through the use of information technology.

We will summarize the comments that we receive and include them in the OTS request for OMB approval. All comments will become a matter of public record. In this notice, OTS is soliciting comments concerning the following information collection.

Title of Proposal: Application Filing Requirements.

OMB Number: 1550–0056.

Form Number: N/A.

Description: OTS regulations require that applications, notices, or other filings must be submitted to the appropriate Regional Office of OTS. *See* 12 CFR 516.40(a). Section 516.40(a) requires the applicant to file the original application and the number of copies indicated on the applicable form with the applications filing division of the appropriate Regional Office. If the form does not indicate the number of copies the applicant must file or if OTS has not prescribed a form for the application, the applicant must file the original application and two copies. The applicant must caption the original application and all required copies with the type of filing and must include all exhibits and required documents with the original and the required copies. 12 CFR 516.30(b). If an application, notice, or other filing raises a significant issue of law or policy, or the form instructs the applicant to file with OTS Headquarters, the applicant must also file copies of the application with the Applications Filing Room at OTS in Washington, DC. The applicant must file the number of copies with OTS Headquarters that are indicated on the applicable form. If the form does not indicate the number of copies, or if OTS has not prescribed a form for the application, the applicant must file three copies with OTS Headquarters. 12 CFR 516.40(b).

Type of Review: Extension of a currently approved collection.

Affected Public: Businesses or other for-profit.

Estimated Number of Respondents: 1,175.

Estimated Frequency of Response: On occasion.

Estimated Total Burden: 200 hours.

Dated: May 3, 2011.

Ira L. Mills,

Paperwork Clearance Officer, Office of Chief Counsel, Office of Thrift Supervision.

[FR Doc. 2011–11151 Filed 5–6–11; 8:45 am]

BILLING CODE 6720–01–P

FEDERAL REGISTER

Vol. 76 Monday,
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Part II

Department of Health and Human Services

Centers for Medicare & Medicaid Services

42 CFR Part 418
Medicare Program; Hospice Wage Index for Fiscal Year 2012;
Proposed Rule

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

42 CFR Part 418

[CMS–1355–P]

RIN 0938–AQ31

Medicare Program; Hospice Wage Index for Fiscal Year 2012

AGENCY: Centers for Medicare & Medicaid Services (CMS), HHS.

ACTION: Proposed rule.

SUMMARY: This proposed rule would set forth the hospice wage index for fiscal year 2012 and continue the phase-out of the wage index budget neutrality adjustment factor (BNAF), with an additional 15 percent BNAF reduction, for a total BNAF reduction in FY 2012 of 40 percent. The BNAF phase-out will continue with successive 15 percent reductions from FY 2013 through FY 2016. This proposed rule would change the hospice aggregate cap calculation methodology. This proposed rule also would revise the hospice requirement for a face-to-face encounter for recertification of a patient's terminal illness. Finally, this proposed rule would begin implementation of a hospice quality reporting program.

DATES: *Comment Date:* To be assured consideration, comments must be received at one of the addresses provided below, no later than 5 p.m. eastern time on July 8, 2011.

ADDRESSES: In commenting, please refer to file code CMS–1355–P. Because of staff and resource limitations, we cannot accept comments by facsimile (FAX) transmission.

You may submit comments in one of four ways (please choose only one of the ways listed):

1. *Electronically.* You may submit electronic comments on this regulation to *http://www.regulations.gov.* Follow the instructions under the "More Search Options" tab.

2. *By regular mail.* You may mail written comments to the following address ONLY: Centers for Medicare & Medicaid Services, Department of Health and Human Services, Attention: CMS–1355–P, P.O. Box 8012, Baltimore, MD 21244–1850.

Please allow sufficient time for mailed comments to be received before the close of the comment period.

3. B*y express or overnight mail.* You may send written comments to the following address ONLY: Centers for Medicare & Medicaid Services, Department of Health and Human Services, Attention: CMS–1355–P, Mail Stop C4–26–05, 7500 Security Boulevard, Baltimore, MD 21244–1850.

4. *By hand or courier.* If you prefer, you may deliver (by hand or courier) your written comments before the close of the comment period to either of the following addresses: a. For delivery in Washington, DC—Centers for Medicare & Medicaid Services, Department of Health and Human Services, Room 445–G, Hubert H. Humphrey Building, 200 Independence Avenue, SW., Washington, DC 20201.

(Because access to the interior of the Hubert H. Humphrey Building is not readily available to persons without Federal government identification, commenters are encouraged to leave their comments in the CMS drop slots located in the main lobby of the building. A stamp-in clock is available for persons wishing to retain a proof of filing by stamping in and retaining an extra copy of the comments being filed.)

b. For delivery in Baltimore, MD—Centers for Medicare & Medicaid Services, Department of Health and Human Services, 7500 Security Boulevard, Baltimore, MD 21244–1850. If you intend to deliver your comments to the Baltimore address, please call telephone number (410) 786 9994 in advance to schedule your arrival with one of our staff members.

Comments mailed to the addresses indicated as appropriate for hand or courier delivery may be delayed and received after the comment period.

For information on viewing public comments, see the beginning of the **SUPPLEMENTARY INFORMATION** section.

FOR FURTHER INFORMATION CONTACT: For information regarding "Quality Reporting for Hospices" and "Collection of Information Requirements" sections, please contact Robin Dowell at (410) 786–0060. For information regarding "Hospice Wage Index" and "Hospice Face-to-Face Requirement" sections, please contact Anjana Patel at (410) 786–2120. For information regarding all other sections, please contact Katie Lucas at (410) 786–7723.

SUPPLEMENTARY INFORMATION:

Submitting Comments: We welcome comments from the public on all issues set forth in this rule to assist us in fully considering issues and developing policies. You can assist us by referencing the file code CMS–1355–P and the specific "issue identifier" that precedes the section on which you choose to comment.

Inspection of Public Comments: All comments received before the close of the comment period are available for viewing by the public, including any personally identifiable or confidential business information that is included in a comment. We post all comments received before the close of the comment period on the following Web site as soon as possible after they have been received: *http://www.regulations.gov.* Follow the search instructions on that Web site to view public comments.

Comments received timely will also be available for public inspection as they are received, generally beginning approximately 3 weeks after publication of a document, at the headquarters of the Centers for Medicare & Medicaid Services, 7500 Security Boulevard, Baltimore, Maryland 21244, Monday through Friday of each week from 8:30 a.m. to 4 p.m. To schedule an appointment to view public comments, phone 1–800–743–3951.

Table of Contents

I. Background

A. General

1. Hospice Care

Hospice care is an approach to treatment that recognizes that the impending death of an individual warrants a change in the focus from curative to palliative care, for relief of pain and for symptom management. The goal of hospice care is to help terminally ill individuals continue life with minimal disruption to normal activities while remaining primarily in the home environment. A hospice uses an interdisciplinary approach to deliver medical, nursing, social, psychological, emotional, and spiritual services through use of a broad spectrum of professional and other caregivers, with the goal of making the individual as physically and emotionally comfortable as possible. Counseling services and inpatient respite services are available to the family of the hospice patient. Hospice programs consider both the patient and the family as a unit of care.

Section 1861(dd) of the Social Security Act (the Act) provides for coverage of hospice care for terminally ill Medicare beneficiaries who elect to receive care from a participating hospice. Section 1814(i) of the Act provides payment for Medicare participating hospices.

2. Medicare Payment for Hospice Care

Our regulations at 42 CFR part 418 establish eligibility requirements, payment standards and procedures, define covered services, and delineate the conditions a hospice must meet to be approved for participation in the Medicare program. Part 418 subpart G provides for payment in one of four prospectively-determined rate categories (routine home care, continuous home care, inpatient respite care, and general inpatient care) to hospices based on each day a qualified Medicare beneficiary is under a hospice election.

B. Hospice Wage Index

The hospice wage index is used to adjust payment rates for hospice agencies under the Medicare program to reflect local differences in area wage levels. Our regulations at § 418.306(c) require each hospice's labor market to be established using the most current hospital wage data available, including any changes by the Office of Management and Budget (OMB) to the Metropolitan Statistical Areas (MSAs) definitions. OMB revised the MSA definitions beginning in 2003 with new designations called the Core Based Statistical Areas (CBSAs). For the purposes of the hospice benefit, the term "MSA-based" refers to wage index values and designations based on the previous MSA designations before 2003. Conversely, the term "CBSA-based" refers to wage index values and designations based on the OMB revised MSA designations in 2003, which now include CBSAs. In the August 11, 2004 Inpatient Prospective Payment System (IPPS) final rule (69 FR 48916, 49026), revised labor market area definitions were adopted at § 412.64(b), which were effective October 1, 2004 for acute care hospitals. We also revised the labor market areas for hospices using the new OMB standards that included CBSAs. In the FY 2006 hospice wage index final rule (70 FR 45130), we implemented a 1-year transition policy using a 50/50 blend of the CBSA-based wage index values and the Metropolitan Statistical Area (MSA)-based wage index values for FY 2006. The one-year transition policy ended on September 30, 2006. For fiscal years 2007 and beyond, we use CBSAs.

The original hospice wage index was based on the 1981 Bureau of Labor Statistics hospital data and had not been updated since 1983. In 1994, because of disparity in wages from one geographical location to another, a committee was formulated to negotiate a wage index methodology that could be accepted by the industry and the government. This committee, functioning under a process established by the Negotiated Rulemaking Act of 1990, comprised representatives from national hospice associations; rural, urban, large and small hospices and multi-site hospices; consumer groups; and a government representative. On April 13, 1995, the Hospice Wage Index Negotiated Rulemaking Committee (the Committee) signed an agreement for the methodology to be used for updating the hospice wage index.

In the August 8, 1997 **Federal Register** (62 FR 42860), we published a final rule implementing a new methodology for calculating the hospice wage index based on the recommendations of the negotiated rulemaking committee. The Committee's statement was included in the appendix of that final rule (62 FR 42883).

The reduction in overall Medicare payments if a new wage index were adopted was noted in the November 29, 1995 notice transmitting the recommendations of the Committee (60 FR 61264). Therefore, the Committee also decided that for each year in updating the hospice wage index, aggregate Medicare payments to hospices would remain budget neutral to payments as if the 1983 wage index had been used.

As suggested by the Committee, "budget neutrality" would mean that, in a given year, estimated aggregate payments for Medicare hospice services using the updated hospice values would equal estimated payments that would have been made for these services if the 1983 hospice wage index values had remained in effect. Although payments to individual hospice programs would change each year, the total payments each year to hospices would not be affected by using the updated hospice wage index because total payments would be budget neutral as if the 1983 wage index had been used. To implement this policy, a Budget Neutrality Adjustment Factor (BNAF) would be computed and applied annually to the pre-floor, pre-reclassified hospital wage index when deriving the hospice wage index.

The BNAF is calculated by computing estimated payments using the most recent, completed year of hospice claims data. The units (days or hours) from those claims are multiplied by the updated hospice payment rates to calculate estimated payments. For the FY 2011 Hospice Wage Index Notice with Comment Period, that meant estimating payments for FY 2011 using FY 2009 hospice claims data, and applying the FY 2011 hospice payment rates (updating the FY 2010 rates by the FY 2011 inpatient hospital market basket update). The FY 2011 hospice wage index values are then applied to the labor portion of the payment rates only. The procedure is repeated using the same claims data and payment rates, but using the 1983 BLS-based wage index instead of the updated raw pre-floor, pre-reclassified hospital wage index (note that both wage indices include their respective floor adjustments). The total payments are then compared, and the adjustment required to make total payments equal is computed; that adjustment factor is the BNAF.

The FY 2010 Hospice Wage Index Final Rule (74 FR 39384) finalized a provision for a 7-year phase-out of the BNAF, which is applied to the wage index values. The BNAF was reduced by 10 percent in FY 2010, an additional 15 percent in FY 2011, and will be reduced by an additional 15 percent in each of the next 5 years, for complete phase out in 2016.

The hospice wage index is updated annually. Our most recent annual hospice wage index Notice with Comment Period, published in the **Federal Register** (75 FR 42944) on July 22, 2010, set forth updates to the hospice wage index for FY 2011. As noted previously, that update included the second year of a 7-year phase-out of the BNAF, which was applied to the wage index values. The BNAF was reduced by 10 percent in FY 2010 and by an additional 15 percent in 2011, for a total FY 2011 reduction of 25 percent.

1. Raw Wage Index Values (Pre-Floor, Pre-Reclassified Hospital Wage Index)

As described in the August 8, 1997 hospice wage index final rule (62 FR 42860), the pre-floor and pre-reclassified hospital wage index is used as the raw wage index for the hospice benefit. These raw wage index values are then subject to either a budget neutrality adjustment or application of the hospice floor to compute the hospice wage index used to determine payments to hospices.

Pre-floor, pre-reclassified hospital wage index values of 0.8 or greater are currently adjusted by a reduced BNAF. As noted above, for FY 2011, the BNAF was reduced by a cumulative total of 25 percent. Pre-floor, pre-reclassified hospital wage index values below 0.8 are adjusted by the greater of: (1) The hospice BNAF, reduced by a total of 25 percent for FY 2011; or (2) the hospice floor (which is a 15 percent increase) subject to a maximum wage index value of 0.8. For example, if in FY 2011, County A had a pre-floor, pre-reclassified hospital wage index (raw wage index) value of 0.3994, we would perform the following calculations using the budget neutrality factor (which for this example is an unreduced BNAF of 0.060562, less 25 percent, or 0.045422) and the hospice floor to determine County A's hospice wage index:

Pre-floor, pre-reclassified hospital wage index value below 0.8 multiplied by the 25 percent reduced BNAF: ($0.3994 \times 1.045422 = 0.4175$).

Pre-floor, pre-reclassified hospital wage index value below 0.8 multiplied by the hospice floor: ($0.3994 \times 1.15 = 0.4593$).

Based on these calculations, County A's hospice wage index would be 0.4593.

The BNAF has been computed and applied annually, in full or in reduced form, to the labor portion of the hospice payment. Currently, the labor portion of the payment rates is as follows: for Routine Home Care, 68.71 percent; for Continuous Home Care, 68.71 percent; for General Inpatient Care, 64.01 percent; and for Respite Care, 54.13 percent. The non-labor portion is equal to 100 percent minus the labor portion for each level of care. Therefore the non-labor portion of the payment rates is as follows: for Routine Home Care, 31.29 percent; for Continuous Home Care, 31.29 percent; for General Inpatient Care, 35.99 percent; and for Respite Care, 45.87 percent.

2. Changes to Core Based Statistical Area (CBSA) Designations

The annual update to the hospice wage index is published in the **Federal Register** and is based on the most current available hospital wage data, as well as any changes by the OMB to the definitions of MSAs, which now include CBSA designations. The August 4, 2005 final rule (70 FR 45130) set forth the adoption of the changes discussed in the OMB Bulletin No. 03–04 (June 6, 2003), which announced revised definitions for Micropolitan Statistical Areas and the creation of MSAs and Combined Statistical Areas. In adopting the OMB CBSA geographic designations, we provided for a 1-year transition with a blended hospice wage index for all hospices for FY 2006. For FY 2006, the hospice wage index consisted of a blend of 50 percent of the FY 2006 MSA-based hospice wage index and 50 percent of the FY 2006 CBSA based hospice wage index. Subsequent fiscal years have used the full CBSA-based hospice wage index.

3. Definition of Rural and Urban Areas

Each hospice's labor market is determined based on definitions of MSAs issued by OMB. In general, an urban area is defined as an MSA or New England County Metropolitan Area (NECMA), as defined by OMB. Under § 412.64(b)(1)(ii)(C), a rural area is defined as any area outside of the urban area. The urban and rural area geographic classifications are defined in § 412.64(b)(1)(ii)(A) through (C), and have been used for the Medicare hospice benefit since implementation.

When the raw pre-floor, pre-reclassified hospital wage index was adopted for use in deriving the hospice wage index, it was decided not to take into account IPPS geographic reclassifications. This policy of following OMB designations of rural or urban, rather than considering some Counties to be "deemed" urban, is consistent with our policy of not taking into account IPPS geographic reclassifications in determining payments under the hospice wage index.

4. Areas Without Hospital Wage Data

When adopting OMB's new labor market designations in FY 2006, we identified some geographic areas where there were no hospitals, and thus, no hospital wage index data on which to base the calculation of the hospice wage index. Beginning in FY 2006, we adopted a policy to use the FY 2005 pre-floor, pre-reclassified hospital wage index value for rural areas when no hospital wage data were available. We also adopted the policy that for urban labor markets without a hospital from which a hospital wage index data could be derived, all of the CBSAs within the State would be used to calculate a statewide urban average pre-floor, pre-reclassified hospital wage index value to use as a reasonable proxy for these areas. Consequently, in subsequent fiscal years, we applied the average pre-floor, pre-reclassified hospital wage index data from all urban areas in that state, to urban areas without a hospital. This year the only such CBSA is 25980, Hinesville-Fort Stewart, Georgia.

Under the CBSA labor market areas, there are no hospitals in rural locations in Massachusetts and Puerto Rico. Since there was no rural proxy for more recent

rural data within those areas, in the FY 2006 hospice wage index proposed rule (70 FR 22394, 22398), we proposed applying the FY 2005 pre-floor, pre-reclassified hospital wage index value to rural areas where no hospital wage data were available. In the FY 2006 final rule and in the FY 2007 update notice, we applied the FY 2005 pre-floor, pre-reclassified hospital wage index data for areas lacking hospital wage data in both FY 2006 and FY 2007 for rural Massachusetts and rural Puerto Rico.

In the FY 2008 final rule (72 FR 50214, 50217) we considered alternatives to our methodology to update the pre-floor, pre-reclassified hospital wage index for rural areas without hospital wage data. We indicated that we believed that the best imputed proxy for rural areas, would: (1) Use pre-floor, pre-reclassified hospital data; (2) use the most local data available to impute a rural pre-floor, pre-reclassified hospital wage index; (3) be easy to evaluate; and, (4) be easy to update from year-to-year.

Therefore, in FY 2008 through FY 2011, in cases where there was a rural area without rural hospital wage data, we used the average pre-floor, pre-reclassified hospital wage index data from all contiguous CBSAs to represent a reasonable proxy for the rural area. This approach does not use rural data; however, the approach, which uses pre-floor, pre-reclassified hospital wage data, is easy to evaluate, is easy to update from year-to-year, and uses the most local data available. In the FY 2008 rule (72 FR at 50217), we noted that in determining an imputed rural pre-floor, pre-reclassified hospital wage index, we interpret the term "contiguous" to mean sharing a border. For example, in the case of Massachusetts, the entire rural area consists of Dukes and Nantucket counties. We determined that the borders of Dukes and Nantucket counties are contiguous with Barnstable and Bristol counties. Under the adopted methodology, the pre-floor, pre-reclassified hospital wage index values for the counties of Barnstable (CBSA 12700, Barnstable Town, MA) and Bristol (CBSA 39300, Providence-New Bedford-Fall River, RI-MA) would be averaged resulting in an imputed pre-floor, pre-reclassified rural hospital wage index for FY 2008. We noted in the FY 2008 final hospice wage index rule that while we believe that this policy could be readily applied to other rural areas that lack hospital wage data (possibly due to hospitals converting to a different provider type, such as a Critical Access Hospital, that does not submit the appropriate wage data), if a similar situation arose in the future, we would re-examine this policy.

We also noted that we do not believe that this policy would be appropriate for Puerto Rico, as there are sufficient economic differences between hospitals in the United States and those in Puerto Rico, including the payment of hospitals in Puerto Rico using blended Federal/Commonwealth-specific rates. Therefore, we believe that a separate and distinct policy is necessary for Puerto Rico. Any alternative methodology for imputing a pre-floor, pre-reclassified hospital wage index for rural Puerto Rico would need to take into account the economic differences between hospitals in the United States and those in Puerto Rico. Our policy of imputing a rural pre-floor, pre-reclassified hospital wage index based on the pre-floor, pre-reclassified hospital wage index (or indices) of CBSAs contiguous to the rural area in question does not recognize the unique circumstances of Puerto Rico. While we have not yet identified an alternative methodology for imputing a pre-floor, pre-reclassified hospital wage index for rural Puerto Rico, we will continue to evaluate the feasibility of using existing hospital wage data and, possibly, wage data from other sources. For FY 2008 through FY 2011, we have used the most recent pre-floor, pre-reclassified hospital wage index available for Puerto Rico, which is 0.4047.

5. CBSA Nomenclature Changes

The OMB regularly publishes a bulletin that updates the titles of certain CBSAs. In the FY 2008 Final Rule (72 FR 50218), we noted that the FY 2008 rule and all subsequent hospice wage index rules and notices would incorporate CBSA changes from the most recent OMB bulletins. The OMB bulletins may be accessed at *http://www.whitehouse.gov/omb/bulletins/index.html.*

6. Wage Data From Multi-Campus Hospitals

Historically, under the Medicare hospice benefit, we have established hospice wage index values calculated from the raw pre-floor, pre-reclassified hospital wage data (also called the IPPS wage index) without taking into account geographic reclassification under sections 1886(d)(8) and (d)(10) of the Act. The wage adjustment established under the Medicare hospice benefit is based on the location where services are furnished without any reclassification.

For FY 2010, the data collected from cost reports submitted by hospitals for cost reporting periods beginning during FY 2005 were used to compute the 2009 raw pre-floor, pre-reclassified hospital wage index data, without taking into account geographic reclassification under sections 1886(d)(8) and (d)(10) of the Act. This 2009 raw pre-floor, pre-reclassified hospital wage index was used to derive the applicable wage index values for the hospice wage index because these data (FY 2005) were the most recent complete cost data.

Beginning in FY 2008, the IPPS apportioned the wage data for multi-campus hospitals located in different labor market areas (CBSAs) to each CBSA where the campuses were located (see the FY 2008 IPPS final rule with comment period (72 FR 47317 through 47320)). We are continuing to use the raw pre-floor, pre-reclassified hospital wage data as a basis to determine the hospice wage index values because hospitals and hospices both compete in the same labor markets, and therefore, experience similar wage-related costs. We note that the use of raw pre-floor, pre-reclassified hospital (IPPS) wage data used to derive the FY 2012 hospice wage index values, reflects the application of our policy to use those data to establish the hospice wage index. The FY 2012 hospice wage index values presented in this proposed rule were computed consistent with our raw pre-floor, pre-reclassified hospital (IPPS) wage index policy (that is, our historical policy of not taking into account IPPS geographic reclassifications in determining payments for hospice). As implemented in the August 8, 2008 FY 2009 Hospice Wage Index final rule, for the FY 2009 Medicare hospice benefit, the hospice wage index was computed from IPPS wage data (submitted by hospitals for cost reporting periods beginning in FY 2004 (as was the FY 2008 IPPS wage index)), which allocated salaries and hours to the campuses of two multi-campus hospitals with campuses that are located in different labor areas, one in Massachusetts and another in Illinois. Thus, in FY 2009 and subsequent fiscal years, hospice wage index values for the following CBSAs have been affected by this policy: Boston-Quincy, MA (CBSA 14484), Providence-New Bedford-Falls River, RI-MA (CBSA 39300), Chicago-Naperville-Joliet, IL (CBSA 16974), and Lake County-Kenosha County, IL-WI (CBSA 29404).

7. Hospice Payment Rates

Section 4441(a) of the Balanced Budget Act of 1997 (BBA) amended section 1814(i)(1)(C)(ii) of the Act to establish updates to hospice rates for FYs 1998 through 2002. Hospice rates were to be updated by a factor equal to the market basket index, minus 1

percentage point. Payment rates for FYs since 2002 have been updated according to section 1814(i)(1)(C)(ii)(VII) of the Act, which states that the update to the payment rates for subsequent fiscal years will be the market basket percentage for the fiscal year. It has been longstanding practice to use the inpatient hospital market basket as a proxy for a hospice market basket.

Historically, the rate update has been published through a separate administrative instruction issued annually in the summer to provide adequate time to implement system change requirements. Hospices determine their payments by applying the hospice wage index in this proposed rule to the labor portion of the published hospice rates. Section 3401(g) of the Affordable Care Act of 2010 requires that, in FY 2013 (and in subsequent fiscal years), the market basket percentage update under the hospice payment system as described in Section 1814(i)(1)(C)(ii)(VII) or Section 1814(i)(1)(C)(iii) be annually reduced by changes in economy-wide productivity as set out at section 1886(b)(3)(B)(xi)(II) of the Act. Additionally, Section 3401(g) of the Affordable Care Act requires that in FY 2013 through FY 2019, the market basket percentage update under the hospice payment system be reduced by an additional 0.3 percentage point (although the potential reduction is subject to suspension under conditions set out under new section 1814(i)(1)(C)(v) of the Act). Congress also required, in section 3004(c) of the Affordable Care Act, that hospices begin submitting quality data, based on measures to be specified by the Secretary, for FY 2014 and subsequent fiscal years. Beginning in FY 2014, hospices which fail to report quality data will have their market basket update reduced by 2 percentage points.

II. Summary of Cap Comments Solicited in the FY 2011 Hospice Wage Index Notice With Comment Period

Section 1814(i)(2)(A) through (C) of the Act establishes a cap on aggregate payments made to a Medicare hospice provider and prescribes a basic methodology for calculating the aggregate cap. The aggregate cap limits the total aggregate payment any individual hospice can receive in a year. A hospice's "aggregate cap" is calculated by multiplying the number of beneficiaries who have elected hospice care during an accounting year by a per-beneficiary "cap amount." The Act established the per-beneficiary cap amount and provides an annual increase to the cap amount based on the rate of increase in the medical care expenditures category of the Consumer Price Index. The 2010 per-beneficiary cap amount was $23,874.98.

A hospice's aggregate cap is compared with the total Medicare payments made to the hospice during the same accounting year. Any Medicare payments in excess of the aggregate cap are considered overpayments and must be returned to Medicare by the hospice.

CMS' contractors calculate each hospice's aggregate cap every year, and establish an overpayment for any hospice that exceeds the aggregate cap. For the aggregate cap calculation, regulations at 42 CFR 418.309 define the total number of beneficiaries as the number of individuals who have elected hospice and have not previously been included in any cap calculation, reduced to reflect the proportion of hospice care that was provided in another hospice. These regulations also define the accounting year, or cap year, as the period from November 1st to October 31st.

In the FY 2011 Hospice Wage Index Notice with Comment Period, we noted that there have been some technological advances in our data systems which we believe might enable us to modernize the aggregate cap calculation process while providing information facilitating the ability of hospices to better manage their aggregate cap. We provided details regarding policy options that we are considering for modernizing the aggregate cap calculation methodology and solicited comments on those policy options; we also solicited comments or suggestions for other possible options/alternatives to modernize the cap calculation methodology, to be considered in possible future rulemaking.

In that Notice, we described a policy option that would align the cap year with the federal fiscal year and policy options we were considering regarding how to count beneficiaries when computing the aggregate cap. We also described our plans to redesign the Provider Statistical and Reimbursement Report (PS&R) to show a beneficiary's full utilization history, and discussed having a uniform schedule for mailing cap determination letters.

The policy options we described regarding how to count beneficiaries when computing the aggregate cap were:

- *Option 1:* In this option, we described several approaches where we would apply a patient-by-patient proportional methodology to all hospices' aggregate cap calculations. Under the patient-by-patient proportional methodology, the number of patients for a given cap year and hospice would be the patient-by-patient proportional share of each patient's days in that hospice during the cap year, when considering the patient's total days of Medicare hospice care in multiple cap years and multiple hospices. One approach we described would apportion each patient across the year of election and one additional year, as our analysis showed that 99.98 percent of patients who died in hospice were admitted to hospice either in the year that they died, or in the previous year. We also described an approach where a hospice could request the Medicare contractor recalculate the hospice's aggregate cap using longer timeframes.
- *Option 2:* In this option, we described an approach which would defer across-the-board changes to the aggregate cap calculation methodology for all hospices until we implement hospice payment reform, but it would allow individual hospices to request the Medicare contractor to apply a patient-by-patient proportional methodology to its aggregate cap calculations.

For more information on future hospice payment reform, please see section IV.A of this proposed rule. For details on these options or issues, please see the July 22, 2010 Hospice Wage Index for Fiscal Year 2011 Notice with Comment Period (75 FR 42944). We received 27 public comments about the aggregate cap, with commenters expressing differing views on issues surrounding the aggregate cap. We also received several comments which were outside the scope of the solicitation.

Comment: We received public comments from 27 individuals or groups, with 1 missing an attachment, for a total of 26 comments.

Two commenters supported Option 1, with apportioning of hospice beneficiaries across 2 years; one noted that this option covers more than two 180-day periods, while providing a fixed end date. The other commenter urged us to move forward with Option 1 while additional data collection and payment reforms are pending.

More commenters suggested we choose Option 2 than any other approach. Ten commenters supported Option 2, and suggested that we defer major changes to the aggregate cap methodology until payment reform occurs, unless a hospice requests multi-year apportioning. These commenters were concerned about the burden associated with changing the aggregate cap methodology now, and preferred that we wait until broader payment reform to make a change. They noted that the majority of hospices don't exceed their aggregate cap, and therefore don't want to change. One commenter

urged CMS to retain the existing methodology, as creating a complicated, open-ended apportioning approach would disadvantage most hospices. This commenter stated that very few hospices have an aggregate cap liability, and asked that we not create an administrative burden for the vast majority of hospices that do not exceed the aggregate cap, but instead direct our aggregate cap changes to the minority of hospices that have some kind of liability.

Some felt that Option 2 was simpler and would provide flexibility for those who wanted their aggregate cap calculated using a multi-year apportionment methodology. The major hospice associations urged CMS to defer any major across-the-board changes to the cap calculation methodology until the implementation of hospice payment reform, because of concerns that any changes to the current methodology would result in additional cost and burden to hospices. One association also suggested we fully examine the cap and whether other alternatives would better address patient needs, suggesting that we address alternatives in the context of broader payment reform.

While these 10 commenters supported allowing individual hospice programs the option of requesting a recalculation of their cap determination using a multi-year apportionment methodology, some were concerned that this could have implications for hospices that had not requested a recalculation. A commenter suggested that should CMS re-open cap determinations for hospices that had not requested a recalculation, we could potentially harm hospices and ultimately risk access for patients who had been served by more than one hospice. This commenter added that CMS should 'hold harmless' hospice programs that had not requested cap recalculation against overpayments that may occur as the result of another hospice program requesting recalculation of its cap. This commenter also urged CMS to adopt policies allowing greater flexibility with respect to repayment plans for those with cap overages.

In contrast to those supporting Option 2, 9 commenters supported an open-ended multi-year apportioning approach. Many of these commenters felt that changes to the methodology should be applied to all hospices. Several of the commenters cited the lawsuits filed against the Secretary which dispute the methodology for counting beneficiaries in the aggregate cap calculation. One of these commenters supported allowing re-opening of prior years' cap reports in conjunction with a revised regulation allowing a "true" patient-by-patient proportional allocation of beneficiaries' time across all years of service. One commenter suggested we allow re-opening of any cap demand which occurred after February 13, 2008, noting that this was the first date that a court held our regulation to be unlawful. Some of these commenters requested that we suspend the use of the existing regulation. Some commenters suggested that the existing regulation disadvantages patients with non-cancer diagnoses or who are minorities.

Some of these commenters disputed the statistic that 99.98 percent of patients who died in 2007 were admitted in 2006 or 2007, and argued that increasing the time limit for a patient-by-patient proportional calculation to 2 years, as suggested in our options, would not solve the problem. These commenters, who advocated an open-ended patient-by-patient proportional calculation, suggested we focus on how many hospice patients were still alive as of the end of 2007; they stated that our statistic was based on the percentage of patients who died rather than on those who were alive at the end of 2007. These commenters suggested a larger percentage of patients were alive, and cited data for patients admitted between 2003 and 2007, who were still alive as of December 31, 2007. They believe these patients are harmed by our not using an open-ended patient-by-patient proportional allocation in computing the aggregate cap. A commenter asked that contractors perform the calculation consistently, and be instructed on how to handle its detailed mechanics when adjustments occur.

Some of these 9 commenters felt that the current Local Coverage Determinations (LCDs) were of little use in predicting patient prognoses, with one noting that the current LCDs led to appropriate but sometimes long-stay admissions, which often resulted in reimbursements that exceeded the aggregate cap. They argued that the LCDs were not evidence-based. One commenter asserted that every patient reviewed for appropriateness of admission met his contractor's LCDs, and yet these patients had long lengths of stay.

Also, several of these 9 commenters suggested we support H.R. 3454, the Medicare Hospice Reform and Savings Act of 2009, parts of which were adopted into section 3132 of the Affordable Care Act. Commenters stated that the bill would have resulted in pay-as-you-go reductions in reimbursements for patients with lengths of stay exceeding 180 days. They stated that H.R. 3454 would have abolished the cap and eliminated unintended incentives for long stays, reduced Medicare hospice costs, and reduced our administrative burden. Commenters said that this legislation would have increased hospice rates by 20 percent for the first and last five days of hospice care that ends in the death of the patient; these reductions would have been offset by another 3 percent reduction in the daily hospice rates for those patients with lengths of stay beyond 180 days. They stated that this legislation would have updated LCDs or created National Coverage Determinations which would be improved, evidence-based formulas for determining eligibility. Commenters also stated that this legislation would have paid hospices more for the first and last few days of care, and less for the interim days.

Five other commenters chose no option, or presented their own alternative approaches. One stated that the existing aggregate cap is supposed to represent the "average" cost of caring for a patient, not the maximum cost, where hospices have a mix of patients with different diagnoses and lengths of stay. This commenter felt that the current methodology forces hospices to focus on individual patients rather than on the average patient mix, and was concerned that some hospices may refuse patients with certain diagnoses to avoid exceeding their aggregate cap. This commenter also was concerned about the use of new patient elections as the methodology for counting the number of beneficiaries served in computing the aggregate cap.

Another commenter recommended that each beneficiary be counted as 1 every calendar year, because over the years, more non-cancer terminal diagnoses have appeared, with unpredictable end-of-life trajectories; the commenter stated that these non-cancer patients require higher utilization of resources. The commenter suggested that under this mentioned scenario, each patient on service would begin a new cap year every January 1 and be counted as a new patient for that year.

A different commenter suggested that we modify the aggregate cap to focus on hospices instead of beneficiaries. He suggested that we change the aggregate cap calculation to a 180-day aggregate limit per hospice, which mirrors the 6 month requirement for hospice benefits to be elected. This commenter said that by monitoring an average day limit, all of the multi-year apportioning could be discarded, and replaced with a simple

calculation. Another commenter suggested we allow hospices to carry forward to the following year any "cap cushion" remaining at the end of the year.

Several commenters supported the idea of our aligning the cap year with the federal fiscal year, with some noting that the change would be appropriate for a multi-year apportioning approach. Other commenters stated that we should not change the cap year at this time, and recommended that we wait for future payment reform to do this. Many commenters asked that cap determination letters be mailed or sent in a more timely fashion, and a few said that contractors need to calculate caps consistently.

Commenters applauded efforts by CMS to address the concerns that arise when hospices lack access to accurate and timely histories of patient care. They suggested that the new PS&R include each patient's total days of care, benefit periods by hospice, indicate the initial benefit period, and show all benefit periods that have been used. Commenters also urged that the systems be as "real-time" as possible. Another commenter stated that registration into the IVACS [sic] system (which is used to access the PS&R) was overly cumbersome, and believed that if home care is used as a marker of the success of this new registration system, only 20 percent of home health agencies are currently registered.

Those who commented on our discussion about establishing a uniform schedule for contractors' mailing cap determination letters were supportive of such a process, and felt that this would assist hospices in their planning and budgeting. One commenter asked that the cap determination letter be considered a final determination.

A commenter suggested that we factor a hospice's wage index value when computing a hospice's aggregate cap. The commenter stated that because hospice payments are adjusted by the wage index to account for geographic variances in labor costs, a hospice in an area of relatively high labor costs would have higher aggregate payments in a given cap year than a hospice in an area with relatively low labor costs. Yet, the yearly aggregate payments of both hospices are compared to the same cap amount. The commenter states that high-wage index hospices are unfairly disadvantaged by not factoring in the wage index values to their yearly cap amount, and hospices in low-wage index areas are unfairly advantaged. The commenter felt that our not wage adjusting the cap amount was contrary to the intent of Congress.

Response: We thank the commenters for their insights on these issues. We have considered the comments in developing our proposals related to changing the aggregate cap calculation methodology, which are described in section III.B in this proposed rule. We will consider other comments and suggestions for improvements in the future, as we undertake broader payment reform.

Comment: Some commenters asked for additional data collection on hospice claims or through cost reports, so that CMS will have full resource utilization data related to providing hospice care when it seeks to reform payments. Some commenters stated that they were opposed to the BNAF phase-out. Others were concerned that rural hospices had similar or greater costs than urban hospices and yet were typically paid less due to wage adjustment. A commenter said that the hospital wage index used to create the hospice wage index was not accurate, as hospital wage patterns do not mirror those of hospices; this commenter suggested that we pilot test a hospice-specific wage index. Another commenter stated her concerns regarding the wage index value for her hospice's CBSA, and said that a neighboring CBSA was much higher. The commenter asked to be included in the neighboring CBSA.

Several commenters stated that the Common Working File (CWF) is burdensome and does not provide complete data on a patient's hospice history. A commenter added that some information in CWF was pulled from hospice cost reports, and was unreliable. She added that an industry association had presented us with a prototype cost report to more accurately reflect hospice costs rather than trying to force numbers from hospices into a home care model cost report, but that CMS has been slow in adopting this software.

One commenter was concerned that CMS waived notice and comment rulemaking in our FY 2011 Hospice Wage Index Notice.

Response: We thank the commenters, but we note that these comments are outside the scope of the solicitation.

III. Provisions of the Proposed Rule

A. FY 2012 Hospice Wage Index

1. Background

As previously noted, the hospice final rule published in the **Federal Register** on December 16, 1983 (48 FR 56008) provided for adjustment to hospice payment rates to reflect differences in area wage levels. We apply the appropriate hospice wage index value to the labor portion of the hospice payment rates based on the geographic area where hospice care was furnished. As noted earlier, each hospice's labor market area is based on definitions of MSAs issued by the OMB. For this proposed rule, we used the pre-floor, pre-reclassified hospital wage index, based solely on the CBSA designations, as the basis for determining wage index values for the proposed FY 2012 hospice wage index.

As noted above, our hospice payment rules utilize the wage adjustment factors used by the Secretary for purposes of section 1886(d)(3)(E) of the Act for hospital wage adjustments. We are proposing again to use the pre-floor and pre-reclassified hospital wage index data as the basis to determine the hospice wage index, which is then used to adjust the labor portion of the hospice payment rates based on the geographic area where the beneficiary receives hospice care. We believe the use of the pre-floor, pre-reclassified hospital wage index data, as a basis for the hospice wage index, results in the appropriate adjustment to the labor portion of the costs. For the FY 2012 update to the hospice wage index, we propose to continue to use the most recent pre-floor, pre-reclassified hospital wage index available at the time of publication.

2. Areas Without Hospital Wage Data

In adopting the CBSA designations, we identified some geographic areas where there are no hospitals, and no hospital wage data on which to base the calculation of the hospice wage index. These areas are described in section I.B.4 of this proposed rule. Beginning in FY 2006, we adopted a policy that, for urban labor markets without an urban hospital from which a pre-floor, pre-reclassified hospital wage index can be derived, all of the urban CBSA pre-floor, pre-reclassified hospital wage index values within the State would be used to calculate a statewide urban average pre-floor, pre-reclassified hospital wage index to use as a reasonable proxy for these areas. Currently, the only CBSA that would be affected by this policy is CBSA 25980, Hinesville-Fort Stewart, Georgia. We propose to continue this policy for FY 2012.

Currently, the only rural areas where there are no hospitals from which to calculate a pre-floor, pre-reclassified hospital wage index are Massachusetts and Puerto Rico. In August 2007 (72 FR 50217), we adopted a methodology for imputing rural pre-floor, pre-reclassified hospital wage index values for areas where no hospital wage data are available as an acceptable proxy; that

methodology is also described in section I.B.4 of this proposed rule. In FY 2012, Dukes and Nantucket Counties are the only areas in rural Massachusetts which are affected. We are again proposing to apply this methodology for imputing a rural pre-floor, pre-reclassified hospital wage index for those rural areas without rural hospital wage data in FY 2012.

However, as we noted section I.B.4 of this proposed rule, we do not believe that this policy is appropriate for Puerto Rico. For FY 2012, we again propose to continue to use the most recent pre-floor, pre-reclassified hospital wage index value available for Puerto Rico, which is 0.4047. This pre-floor, pre-reclassified hospital wage index value will then be adjusted upward by the hospice 15 percent floor adjustment in the computing of the proposed FY 2012 hospice wage index.

3. FY 2012 Wage Index With an Additional 15 Percent Reduced Budget Neutrality Adjustment Factor (BNAF)

The hospice wage index set forth in this proposed rule would be effective October 1, 2012 through September 30, 2013. We are not proposing any modifications to the hospice wage index methodology. In accordance with our regulations and the agreement signed with other members of the Hospice Wage Index Negotiated Rulemaking Committee, we are continuing to use the most current hospital data available. For this proposed rule, the FY 2011 hospital wage index was the most current hospital wage data available for calculating the FY 2012 hospice wage index values. We used the FY 2011 pre-floor, pre-reclassified hospital wage index data for this calculation.

As noted above, for FY 2012, the hospice wage index values will be based solely on the adoption of the CBSA-based labor market definitions and the hospital wage index. We continue to use the most recent pre-floor and pre-reclassified hospital wage index data available (based on FY 2007 hospital cost report wage data). A detailed description of the methodology used to compute the hospice wage index is contained in the September 4, 1996 hospice wage index proposed rule (61 FR 46579), the August 8, 1997 hospice wage index final rule (62 FR 42860), and the August 6, 2009 FY 2010 Hospice Wage Index final rule (74 FR 39384).

The August 6, 2009 FY 2010 Hospice Wage Index final rule finalized a provision to phase out the BNAF over 7 years, with a 10 percent reduction in the BNAF in FY 2010, and an additional 15 percent reduction in FY 2011, over each of the next 5 years, with complete phase out in FY 2016. Therefore, in accordance with the August 6, 2009, FY 2010 Hospice Wage Index final rule, the BNAF for FY 2012 was reduced by an additional 15 percent for a total BNAF reduction of 40 percent (10 percent from FY 2010, additional 15 percent from FY 2011, and additional 15 percent for FY 2012).

An unreduced BNAF for FY 2012 is computed to be 0.059061 (or 5.9061 percent). A 40 percent reduced BNAF, which is subsequently applied to the pre-floor, pre-reclassified hospital wage index values greater than or equal to 0.8, is computed to be 0.035437 (or 3.5437 percent). Pre-floor, pre-reclassified hospital wage index values which are less than 0.8 are subject to the hospice floor calculation; that calculation is described in section I.B.1.

The proposed hospice wage index for FY 2012 is shown in Addenda A and B. Specifically, Addendum A reflects the proposed FY 2012 wage index values for urban areas under the CBSA designations. Addendum B reflects the proposed FY 2012 wage index values for rural areas under the CBSA designations.

4. Effects of Phasing Out the BNAF

The full (unreduced) BNAF calculated for FY 2012 is 5.9061 percent. As implemented in the August 6, 2009 FY 2010 Hospice Wage Index final rule (74 FR 39384), for FY 2012 we are reducing the BNAF by an additional 15 percent, for a total BNAF reduction of 40 percent (a 10 percent reduction in FY 2010 plus a 15 percent reduction in FY 2011 plus a 15 percent reduction in FY 2012), with additional reductions of 15 percent per year in each of the next 4 years until the BNAF is phased out in FY 2016.

For FY 2012, this is mathematically equivalent to taking 60 percent of the full BNAF value, or multiplying 0.059061 by 0.60, which equals 0.035437 (3.5437 percent). The BNAF of 3.5437 percent reflects a 40 percent reduction in the BNAF. The 40 percent reduced BNAF (3.5437 percent) was applied to the pre-floor, pre-reclassified hospital wage index values of 0.8 or greater in the proposed FY 2012 hospice wage index.

The hospice floor calculation would still apply to any pre-floor, pre-reclassified hospital wage index values less than 0.8. Currently, the hospice floor calculation has 4 steps. First, pre-floor, pre-reclassified hospital wage index values that are less than 0.8 are multiplied by 1.15. Second, the minimum of 0.8 or the pre-floor, pre-reclassified hospital wage index value times 1.15 is chosen as the preliminary hospice wage index value. Steps 1 and 2 are referred to in this proposed rule as the hospice 15 percent floor adjustment. Third, the pre-floor, pre-reclassified hospital wage index value is multiplied by the BNAF. Fourth, the greater result of either step 2 or step 3 is the final hospice wage index value. The hospice floor calculation is unchanged by the BNAF reduction. We note that steps 3 and 4 will become unnecessary once the BNAF is eliminated.

We examined the effects of an additional 15 percent reduction in the BNAF, for a total BNAF reduction of 40 percent, on the FY 2012 hospice wage index compared to remaining with the total 25 percent reduced BNAF which was used for the FY 2011 hospice wage index. The additional 15 percent BNAF reduction applied to the FY 2012 wage index resulted in a 0.9 percent reduction in 84.4 percent of hospice wage index values, a 0.8 percent reduction in 8.6 percent of hospice wage index values, a 0.7 percent reduction in 0.7 percent of wage index values, and no reduction in 6.3 percent of wage index values.

Those CBSAs whose pre-floor, pre-reclassified hospital wage index values had the hospice 15 percent floor adjustment applied before the BNAF reduction would not be affected by this proposed phase out of the BNAF. These CBSAs, which typically include rural areas, are protected by the hospice 15 percent floor adjustment. We have estimated that 29 CBSAs are already protected by the hospice 15 percent floor adjustment, and are therefore completely unaffected by the BNAF reduction. There are 323 hospices in these 29 CBSAs.

Additionally, some CBSAs with pre-floor, pre-reclassified wage index values less than 0.8 will become newly eligible for the hospice 15 percent floor adjustment as a result of the additional 15 percent reduction in the BNAF applied in FY 2012. Areas where the hospice floor calculation would have yielded a wage index value greater than 0.8 if the 25 percent reduction in BNAF were maintained, but which will have a final wage index value less than 0.8 after the additional 15 percent reduction in the BNAF (for a total BNAF reduction of 40 percent) is applied, will now be eligible for the hospice 15 percent floor adjustment. These CBSAs will see a smaller reduction in their hospice wage index values since the hospice 15 percent floor adjustment will apply. We have estimated that 3 CBSAs will have their pre-floor, pre-reclassified hospital wage index value become newly protected by the hospice 15 percent floor adjustment due to the additional 15 percent reduction in the

BNAF applied in FY 2012. Because of the protection given by the hospice 15 percent floor adjustment, these CBSAs will see smaller percentage decreases in their hospice wage index values than those CBSAs that are not eligible for the hospice 15 percent floor adjustment. This will affect those hospices with lower hospice wage index values, which are typically in rural areas. There are 44 hospices located in these 3 CBSAs.

Finally, the hospice wage index values only apply to the labor portion of the payment rates; the labor portion is described in section I.B.1 of this proposed rule. Therefore, the projected reduction in payments due solely to the additional 15 percent reduction of the BNAF applied in FY 2012 is estimated to be 0.6 percent, as calculated from the difference in column 3 and column 4 of Table 1 in section VII of this proposed rule. In addition, the estimated effects of the phase-out of the BNAF will be mitigated by any inpatient hospital market basket updates in payments. The estimated inpatient hospital market basket update for FY 2012 is 2.8 percent; this 2.8 percent does not reflect the provision in the Affordable Care Act which reduces the inpatient hospital market basket update for FY 2012 by 0.1 percentage point, since that reduction does not apply to hospices. The final update will be communicated through an administrative instruction. The combined effects of the updated wage data, an additional 15 percent reduction of the BNAF, and an estimated inpatient hospital market basket update of 2.8 percent for FY 2012, are an overall estimated increase in payments to hospices in FY 2012 of 2.3 percent (column 5 of Table 1 in section VII of this proposed rule).

B. Aggregate Cap Calculation Methodology

The existing method for counting Medicare beneficiaries in 42 CFR 418.309 has been the subject of substantial litigation. Specifically, the lawsuits challenge the way CMS apportions hospice patients with care spanning more than one year when calculating the cap.

A number of district courts and two appellate courts have concluded that CMS' current methodology used to determine the number of Medicare beneficiaries used in the aggregate cap calculation is not consistent with the statute. We continue to believe that the methodology set forth in § 418.309(b)(1) is consistent with the Medicare statute. Nonetheless, we have determined that it is in the best interest of CMS and the Medicare program to take action to prevent future litigation, and alleviate the litigation burden on providers, CMS, and the courts. On April 15, 2011, we issued a Ruling entitled "Medicare Program; Hospice Appeals for Review of an Overpayment Determination" (CMS–1355–R), related to the aggregate cap calculation for hospices which provided for application of a patient-by-patient proportional methodology, as defined in the Ruling, to hospices that have challenged the current methodology. Specifically, the Ruling provides that, for any hospice which has a timely-filed administrative appeal of the methodology set forth at § 418.309(b)(1) used to determine the number of Medicare beneficiaries used in the aggregate cap calculation for a cap year ending on or before October 31, 2011, the Medicare contractors will recalculate that year's cap determination using the patient-by-patient proportional methodology as set forth in the Ruling.

We are also making several proposals in this Rule that affect cap determinations from two time periods:

- Cap determinations for cap years ending on or before October 31, 2011; and
- Cap determinations for cap years ending on or after October 31, 2012.

1. Cap Determinations for Cap Years Ending on or Before October 31, 2011

By its terms, the relief provided in Ruling 1355–R applies only to those cap years for which a hospice has received an overpayment determination and filed a timely qualifying appeal. For any hospice that receives relief pursuant to Ruling 1355–R in the form of a recalculation of one or more of its cap determinations, or for any hospice that receives relief from a court after challenging the validity of the cap regulation, we propose that the hospice's cap determination for any subsequent cap year also be calculated using a patient-by-patient proportional methodology as opposed to the methodology set forth in 42 CFR 418.309(b)(1). The patient-by-patient proportional methodology is defined below in section III.B.3.

Additionally, there are hospices that have not filed an appeal of an overpayment determination challenging the validity of 42 CFR 418.309(b)(1) and which are awaiting CMS to make a cap determination in a cap year ending on or before October 31, 2011. We propose to allow any such hospice provider, as of October 1, 2011, to elect to have its final cap determination for such cap year(s), and all subsequent cap years, calculated using the patient-by-patient proportional methodology.

Finally, we recognize that most hospices have not challenged the methodology used for determining the number of beneficiaries used in the cap calculation. Therefore, we propose that those hospices which would like to continue to have the existing methodology (hereafter called the streamlined methodology) used to determine the number of beneficiaries in a given cap year would not need to take any action, and would have their cap calculated using the streamlined methodology for cap years ending on or before October 31, 2011. The streamlined methodology is defined in section III.B.4 below.

We do not see these provisions as being impermissibly retroactive in effect. To the extent that these provisions could be considered a retroactive application of a substantive change to a regulation, section 1871(e)(1)(A) of the Act permits retroactive application of a substantive change to a regulation if the Secretary determines that such retroactive application is necessary to comply with statutory requirements or that failure to apply the change retroactively would be contrary to the public interest. We determine that for providers who have successfully sought to have the existing cap methodology set aside as invalid by the courts, retroactive application of the proposed Rule would be necessary to continue to comply with the statutory requirement in section 1814(i)(2) that the Secretary apply an aggregate cap to these hospices' reimbursements. We also determine that it would be in the public interest to calculate the aggregate hospice caps for subsequent years for these providers and for other providers that have filed appeals challenging the validity of the current methodology using the patient-by-patient proportional methodology to prevent the over-counting of beneficiaries for those years and to prevent repetitive litigation. We further determine that it would be in the public interest to permit providers that have not appealed their aggregate cap determinations to elect to have the patient-by-patient proportional methodology applied to aggregate cap determinations that have not been issued as of October 1, 2011. Allowing these hospices to elect to use the patient-by-patient proportional methodology would alleviate the burden on the hospices and the agency of continued appeals and litigation regarding the validity of the aggregate hospice cap calculation.

2. Cap Determinations for Cap Years Ending on or After October 31, 2012

We continue to believe that the methodology set forth in § 418.309(b)(1) is consistent with the Medicare statute. We emphasize that nothing in our proposals in section III.B.1 above constitutes an admission as to any issue of law or fact. In light of the court decisions, however, we propose to change the hospice aggregate cap calculation methodology policy for cap determinations ending on or after October 31, 2012 (the 2012 cap year). Specifically, for the cap year ending October 31, 2012 (the 2012 cap year) and subsequent cap years, we propose to revise the methodology set forth at § 418.309(b)(1) to adopt a patient-by-patient proportional methodology when computing hospices' aggregate caps. We also propose to "grandfather" in the current streamlined methodology set forth in § 418.309(b)(1) for those hospices that elect to continue to have the current streamlined methodology used to determine the number of Medicare beneficiaries in a given cap year, for the following reasons.

As described in section II of this proposed rule, we solicited comments on modernizing the cap calculation in our FY 2011 Hospice Wage Index Notice with Comment Period. We summarized those comments in section II of this proposed rule, and noted that many commenters, including the major hospice associations, were concerned about the burden to hospices of changing the cap calculation methodology, and urged us to defer across-the-board changes to the cap methodology until we analyze the cap in the context of broader payment reform. Specifically, commenters urged CMS to retain the current methodology, as it results in a more streamlined and timely cap determination for providers as compared to other options. Also, commenters noted that once made, cap determinations usually remain final. Commenters were concerned that a proportional methodology could result in prior year cap determination revisions to account for situations in which the percentage of time a beneficiary received services in a prior cap year declines as his or her overall hospice stay continues into subsequent cap years, and these revisions may result in new overpayments for some providers. And, commenters noted that the vast majority of providers don't exceed the cap, so burdening these providers with an across-the-board change isn't justified. We also note that on January 18, 2011, President Obama issued an Executive Order entitled "Improving Regulation and Regulatory Review" (E.O. 13563), which instructs federal agencies to consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public. We believe that offering hospices the option to elect to continue to have the streamlined methodology used in calculating their caps is in keeping with this Executive Order.

For these reasons, for the cap year ending October 31, 2012 (the 2012 cap year) and subsequent cap years, we propose that the hospice aggregate cap be calculated using the patient-by-patient proportional methodology, but propose to allow hospices the option of having their cap calculated via the current streamlined methodology, as discussed below. We believe this two-pronged approach is responsive to the commenters who do not want to be burdened with a change in the cap calculation methodology at this time, while also conforming with decisional law and meeting the needs of hospices that would prefer the patient-by-patient proportional methodology of counting beneficiaries. This grandfathering proposal to allow hospices the option of having their caps calculated based on application of the current streamlined methodology only applies to currently existing hospices that have, or will have, had a cap determination calculated under the streamlined methodology. New hospices that have not had their cap determination calculated using the streamlined methodology do not fall under this proposed "grandfather" policy.

We are in the early stages of the analyses related to payment reform. As such, the role of the aggregate cap in the reformed payment system is unknown at this time. If the reformed system and statute continue to require a limitation on hospice aggregate payments, we would look to apply one aggregate cap policy consistently to all hospices, and will consider commenters' suggestions for improvements in the aggregate cap as we analyze payment reform options.

3. Patient-by-Patient Proportional Methodology

For the cap year ending October 31, 2012 (the 2012 cap year), and for all subsequent cap years (unless changed by future rulemaking), we propose that the Medicare contractors would apply the patient-by-patient proportional methodology (defined below) to a hospice's aggregate cap calculations unless the hospice elects to have its cap determination for cap years 2012 and beyond calculated using the current, streamlined methodology set forth in § 418.309(b)(1).

Under the proposed patient-by-patient proportional methodology, a hospice includes in its number of Medicare beneficiaries only that fraction which represents the portion of a patient's total days of care in all hospices and all years that was spent in that hospice in that cap year, using the best data available at the time of the calculation. We propose that the whole and fractional shares of Medicare beneficiaries' time in a given cap year would then be summed to compute the total number of Medicare beneficiaries served by that hospice in that cap year.

When a hospice's cap is calculated using the patient-by-patient proportional methodology and a beneficiary included in that calculation survives into another cap year, the contractor may need to make adjustments to prior cap determinations, subject to existing re-opening regulations.

4. Streamlined Methodology

As we described above, comments received from hospices and the major hospice associations urged CMS to defer across-the-board changes to the cap calculation methodology until we reform hospice payments. Several of these commenters feared that an across-the-board change in methodology now may disadvantage them by potentially placing them at risk for incurring new cap overpayments. Additionally, approximately 90 percent of hospices do not exceed the cap and have not objected to the current methodology, and commenters expressed concern that adapting to a process change would be costly and burdensome. In response to these concerns, we propose that a hospice may exercise a one-time election to have its cap determination for cap years 2012 and beyond calculated using the current, streamlined methodology set forth in § 418.309(b). We propose that the option to elect the continued use of the streamlined methodology for cap years 2012 and beyond would be available only to hospices that have had their cap determinations calculated using the streamlined methodology for all years prior to cap year 2012. In section III.B.5 ("Changing Methodologies") below, we describe our detailed rationale for limiting the election. Allowing hospices which, prior to cap year 2012, have their cap determination(s) calculated pursuant to a patient-by-patient proportional methodology to elect the streamlined methodology for cap years 2012 and beyond could result in over-

counting patients and introduce a program vulnerability.

Our current policy set forth in the existing § 418.309(b)(2) describes that when a beneficiary receives care from more than one hospice during a cap year or years, each hospice includes in its number of Medicare beneficiaries only that fraction which represents the portion of a patient's total stay in all hospices that was spent in that hospice. We propose to revise the regulatory text at § 418.309(b)(2) to clarify that each hospice includes in its number of Medicare beneficiaries only that fraction which represents the portion of a patient's total days of care in all hospices and all years that was spent in that hospice in that cap year, using the best data available at the time of the calculation. We also propose to add language to make clear that cap determinations are subject to reopening/adjustment to account for updated data.

5. Changing Methodologies

We believe our proposed policies, described above, provide hospices with a reasonable amount of flexibility with regard to their cap calculation. However, we believe that if we allowed hospices to switch back and forth between methodologies, it would greatly complicate the cap determination calculation, would be difficult to administer, and might lead to inappropriate switching by hospices seeking merely to maximize Medicare payments. Additionally, in the year of a change in the calculation methodology, there is a potential for over-counting some beneficiaries. Allowing hospices to switch back and forth between methodologies would perpetuate the risk of over-counting beneficiaries. Therefore, we propose that:

(1) Those hospices that have their cap determination calculated using the patient-by-patient proportional methodology for any cap year prior to the 2012 cap year would continue to have their cap calculated using the patient-by-patient proportional methodology for the 2012 cap year and all subsequent cap years; and,

(2) All other hospices would have their cap determinations for the 2012 cap year and all subsequent cap years calculated using the patient-by-patient proportional methodology unless they make a one-time election to have their cap determinations for cap year 2012 and beyond calculated using the streamlined methodology.

(3) A hospice can elect the streamlined methodology no later than 60 days following the receipt of its 2012 cap determination.

(4) Hospices which elect to have their cap determination calculated using the streamlined methodology may later elect to have their cap determinations calculated pursuant to the patient-by-patient proportional methodology by either:

a. Electing to change to the patient-by-patient proportional methodology; or

b. Appealing a cap determination calculated using the streamlined methodology to determine the number of Medicare beneficiaries.

(5) If a hospice elects the streamlined methodology, and changes to the patient-by-patient proportional methodology for a subsequent cap year, the hospice's aggregate cap determination for that cap year and all subsequent cap years is to be calculated using the patient-by-patient proportional methodology. As such, past cap year determinations may be adjusted to prevent the over-counting of beneficiaries, notwithstanding the ordinary limitations on reopening.

6. Other Issues

Contractors will provide hospices with instructions regarding the cap determination methodology election process. Regardless of which methodology is used, the contractor will continue to demand any additional overpayment amounts due to CMS at the time of the hospice cap determination. The contractor will continue to include the hospice cap determination in a letter which serves as a notice of program reimbursement under 42 CFR 405.1803(a)(3). Cap determinations are subject to the existing CMS re-opening regulations.

In our FY 2011 Hospice Wage Index Notice with Comment Period, we discussed aligning the cap year timeframe with that of the federal fiscal year. Commenters suggested we not make changes to the cap year timeframe at this time, but defer changes until broader payment reform occurs. We agree with commenters, and our cap year continues to be defined as November 1st to October 31st.

In that FY 2011 Hospice Wage Index Notice with Comment Period, we also discussed the timeframe used for counting beneficiaries under the streamlined methodology, which is September 28th to September 27th. This timeframe for counting beneficiaries was implemented because it allows those beneficiaries who elected hospice near the end of the cap year to be counted in the year when most of the services were provided. However, for those hospices whose cap determinations are calculated using a patient-by-patient proportional methodology for counting the number of beneficiaries, we propose to count beneficiaries and their associated days of care from November 1st through October 31st, to match that of the cap year. This ensures that the proportional share of each beneficiary's days in that hospice during the cap year is accurately computed.

Finally, we note that the existing regulatory text at 418.308(b)(1) refers to the timeframe for counting beneficiaries as "(1) * * * the period beginning on September 28 (35 days before the beginning of the cap period) and ending on September 27 (35 days before the end of the cap period)." The period beginning September 28 is actually 34 days before November 1 (the beginning of the cap year), rather than 35 days. We propose to correct this in the regulatory text, and to change references to the "cap period" to that of the "cap year" to correctly reference the time frame for cap determinations.

7. Changes to Regulatory Text

As a result of the proposals made in this section, we propose to change the regulatory text at 42 CFR 418.309 as follows:

- We propose to change the title of 418.309 from "Hospice Cap Amount" to "Hospice Aggregate Cap" to clarify what this section covers. The "cap amount" is defined as the per-beneficiary dollar amount which is updated annually, and is only one component of the aggregate cap calculation. At the beginning of the regulatory text for this section, we also propose to revise the existing language to refer to the methodologies given in (b) and (c) which follow.
- In § 418.309(b), we propose to add the title "Streamlined Methodology Defined" at the beginning of the regulatory text, and to replace "Each hospice's cap amount" with "A hospice's aggregate cap." In § 418.309(b)(1), we propose to revise the language to note that it applied to those beneficiaries who have received care from only one hospice. We also propose to correct the existing regulatory text which reads "* * * (35 days before the beginning of the cap period) * * *" to read "* * * (34 days before the beginning of the cap year) * * *" and change existing regulatory text which reads "* * * and ending on September 27 (35 days before the end of the cap period) * * *" to read "* * * and ending September 27 (35 days before the end of the cap year) * * *."
- We propose to revise § 418.309(b)(2) to describe the streamlined methodology for computing fractional shares of a beneficiary when a beneficiary has received care from more

than one hospice, and to note that the computation considers all cap years and all hospices, using the best data available at the time of the calculation. We also propose to add language that notes that the aggregate cap calculation for a given cap year may be adjusted after the calculation for that year based on updated data.

• We propose to add § 418.309(c), which would be entitled "*Patient-by-Patient Proportional Methodology Defined*." We propose that a hospice's aggregate cap would be calculated by multiplying the adjusted cap amount by the number of Medicare beneficiaries. For the purposes of the patient-by-patient proportional methodology, we propose that a hospice would include in its number of Medicare beneficiaries only that fraction which represents the portion of a patient's total days of care in all hospices and all years that was spent in that hospice in that cap year, using the best data available at the time of the calculation. We propose that the total number of Medicare beneficiaries for a given hospice's cap year would be determined by summing the whole or fractional share of each Medicare beneficiary that received hospice care during the cap year, from that hospice.

Finally, we also propose that the aggregate cap calculation for a given cap year could be adjusted after the calculation for that year based on updated data.

• We propose to add paragraph (d) to section 418.309, which would be entitled "*Application of Methodologies*." We propose that for cap years ending October 31, 2011 and for prior cap years, a hospice's aggregate cap would be calculated using the streamlined methodology. However, we propose that a hospice that has not received a cap determination for a cap year ending on or before October 31, 2011 as of October 1, 2011, could elect to have its final cap determination for such cap years calculated using the patient-by-patient proportional methodology. Additionally, we propose that a hospice that has filed a timely appeal regarding the methodology used for determining the number of Medicare beneficiaries in its cap calculation for any cap year would be deemed to have elected that its cap determination for the challenged year, and all subsequent cap years, be calculated using the patient-by-patient proportional methodology.

We also propose that for cap years ending October 31, 2012, and all subsequent cap years, a hospice's aggregate cap would be calculated using the patient-by-patient proportional methodology. We also propose that a hospice that has had its cap calculated using the patient-by-patient proportional methodology for any cap year(s) prior to the 2012 cap year would not be eligible to elect the streamlined methodology, and would have to continue to have the patient-by-patient proportional methodology used to determine the number of Medicare beneficiaries in a given cap year. We propose that a hospice that is eligible to make a one-time election to have its cap calculated using the streamlined methodology would have to make that election no later than 60 days after receipt of its 2012 cap determination. We also propose that a hospice's election to have its cap calculated using the streamlined methodology would remain in effect unless the hospice subsequently would submit a written election to change the methodology used in its cap determination to the patient-by-patient proportional methodology; or the hospice would appeal the streamlined methodology used to determine the number of Medicare beneficiaries used in the aggregate cap calculation.

Finally, we propose that if a hospice that elected to have its aggregate cap calculated using the streamlined methodology subsequently elected the patient-by-patient proportional methodology or appealed the streamlined methodology, the hospice's aggregate cap determination for that cap year and all subsequent cap years would be calculated using the patient-by-patient proportional methodology. As such, we propose that past cap year determinations could be adjusted to prevent the over-counting of beneficiaries, notwithstanding the ordinary limitations on reopening.

• Throughout § 418.309 we propose to delete references to the intermediary, as this terminology is now outdated.

C. Hospice Face-to-Face Requirement

Section 3132(b) of the Affordable Care Act of 2010 (Pub. L. 111–148, enacted March 23, 2010) amended section 1814(a)(7) of the Act by adding an additional certification requirement that beginning January 1, 2011, a hospice physician or nurse practitioner (NP) must have a face-to-face encounter with every hospice patient prior to the 180-day recertification of the patient's terminal illness to determine continued eligibility. The statute also requires that the hospice physician or NP who performs the encounter attest that such a visit took place in accordance with procedures established by the Secretary. Although the provision allows an NP to perform the face-to-face encounter and attest to it, section 1814(a)(7)(A) of the Act continues to require that a hospice physician must certify and recertify the terminal illness.

The requirement for a physician face-to-face encounter for long-stay hospice patients' was first suggested by Medicare's Payment Advisory Commission (MedPAC) in their March 2009 Report to the Congress (MedPAC, Report to the Congress: Medicare Payment Policy, Chapter 6, March 2009, pp. 365 through 371) ("the MedPAC Report"). MedPAC recommended that a hospice physician or advance practice nurse visit hospice patients prior to the 180-day recertification of terminal illness in order to increase physician accountability in the recertification and help ensure appropriate use of the benefit.

We implemented section 1814(a)(7), as amended by section 3132(b) of the Affordable Care Act in the November 17, 2010 final rule (75 FR 70372), published in the **Federal Register**, entitled "Home Health Prospective Payment System Rate Update for CY 2011; Changes in Certification Requirements for Home Health Agencies and Hospices", hereinafter referred to as the CY 2011 HH PPS Final Rule. The statute requires that for hospice recertifications occurring on or after January 1, 2011, a face-to-face encounter take place before the 180th-day recertification. We decided that the 180th-day recertification and subsequent benefit periods corresponded to the recertification for a patient's third or subsequent benefit period.

In the CY 2011 HH PPS final rule, we describe our rationale for defining the 180th-day recertification as the recertification which occurs at the start of the third benefit period (that is, the benefit period after the second 90-day benefit period). We considered the existing language used in the statute and in our regulations, all of which is structured around the concept of benefit periods which, by statute, cannot last longer than a maximum number of days (90 days for the first two and 60 days for subsequent benefit periods). Our regulatory language at § 418.22 requires certifications at the beginning of the benefit periods. For these reasons we defined the 180th-day recertification to be the recertification which occurs at the start of the third benefit period (75 FR 70437).

These new provisions at § 418.22(a) and (b), as set out in the CY 2011 HH PPS final rule (75 FR 70463) include the following requirements:

• The encounter must occur no more than 30 calendar days prior to the start of the third benefit period and no more

than 30 calendar days prior to every subsequent benefit period thereafter.

- The hospice physician or NP who performs the encounter attests in writing that he or she had a face-to-face encounter with the patient, and includes the date of the encounter. The attestation, which includes the physician's signature and the date of the signature, must be a separate and distinct section of, or an addendum to, the recertification form, and must be clearly titled.
- The physician narrative associated recertifications for the third and subsequent benefit period recertifications include an explanation of why the clinical findings of the face-to-face encounter support a prognosis that the patient has a life expectancy of 6 months or less.
- When an NP performs the encounter, the NP's attestation must state that the clinical findings of that visit were provided to the certifying physician, for use in determining whether the patient continues to have a life expectancy of 6 months or less, should the illness run its normal course.
- The hospice physician or the hospice NP can perform the encounter. We define a hospice physician as a physician who is employed by the hospice or working under contract with the hospice, and a hospice NP must be employed by the hospice.
- The hospice physician who performs the face-to-face encounter and attests to it must be the same physician who certifies the patient's terminal illness and composes the recertification narrative (75 FR 70445).

In this proposed rule, we would allow any hospice physician to perform the encounter and inform the certifying physician for this last requirement for the following reasons:

Since the publication of the CY 2011 HH PPS final rule, we were told of the concerns of stakeholders, such as individual hospices, major hospice associations, physicians, and patient advocacy groups regarding the hospice physician performing both the face-to-face encounter and the recertification. Most of the concerns were that this requirement could potentially result in a substantial risk of harm to terminally ill patients. We find many of these concerns compelling. Specifically, stakeholders describe the challenge rural areas and medically underserved areas have in employing hospice physicians. Often, the physicians employed are part-time, and sometimes several part-time physicians are employed by the hospice. These physicians furnish medically necessary physician services to hospice patients as a team or group practice would, communicating with each other regarding the patients' conditions and sharing responsibility for the patients' care. In requiring the same physician to perform both the face-to-face encounter and the certification, stakeholders argued that we were imposing an unnecessary complexity to the face-to-face encounter requirement which could disadvantage those patients in areas of the country whom they believed were at the greatest risk and could negatively affect access-to-care. Many hospices stated that they would not find it feasible to meet this strict implementation requirement and they would no longer be able to serve patients in the third and later benefit periods. In addition, stakeholders stated that when MedPAC recommended a face-to-face encounter for long-stay hospice patients, it also expressed a concern that the requirement could pose an access risk in rural areas (MedPAC *Report* at 366). To mitigate that risk, MedPAC recommended that NPs also be allowed to perform the encounter, and the Congress adopted that recommendation. Further, stakeholders stated that because the Congress allowed an NP to perform the encounter and inform the recertifying physician, it would be illogical for CMS to preclude another hospice physician from performing the encounter and informing the recertifying physician. The stakeholders stated that in having done so, CMS inadvertently created an access to care risk that MedPAC and the Congress had tried to prevent. Stakeholders stated that long-stay patients in rural and medically underserved areas would be denied access during a time when many are in the final stages of their disease trajectory and needed hospice care the most. Stakeholders suggested that such patients would be denied the pain and symptom management control that they require as a result of CMS's regulatory limitation. In addition, they stated that hospices in rural and medically underserved areas need the flexibility of allowing NPs and any of their hospice physicians to perform the required patient encounter in order to serve such patients.

Many stakeholders also stated that requiring the same hospice physician to perform both the face-to-face encounter and the recertification was contrary to the intent of the statute. They pointed out that the statutory language required that a hospice physician or NP perform the encounter, but the statute did not mandate that the physician who performs the encounter must be the same physician who recertifies the patient. In addition, the stakeholders observed that if the Congress had intended to require the physician who performed the encounter to be the same physician who recertified the patient, then the Congress could have included that requirement in the law.

Stakeholders also stated that MedPAC did not recommend that the physician who performed the encounter be the same physician that recertified the patient. They referred us to discussions in the MedPAC Report, which first recommended the face-to-face encounter. (MedPAC Report, 357 through 371.)

We note that some of these stakeholders were part of the technical expert panel which MedPAC convened in 2008 to develop the recommendations contained in the MedPAC Report. The report described the panel's discussions surrounding the need for more physician involvement in hospice/palliative care, and concerns regarding some hospices' practices being motivated by financial incentives (MedPAC Report, 357 through 367). The report also discussed the panel's concern that hospice medical directors could at times be influenced by such incentives and should be more accountable for eligibility determinations. However, we believe it is possible that the scenario where the hospice medical director was the certifying physician and a different hospice physician performed the encounter and informed the medical director about the patient's condition the result could be better physician accountability than if the medical director performed the encounter. The physician who performed the encounter would serve as an independent assessor of the patient's terminal condition, and would provide a check and balance to the medical director's possible financial incentive to recertify.

Stakeholders also asserted that any hospice physician who saw the patient could achieve the goals described in the MedPAC report and the statute. The report described the tension between hospice physicians and non-physician staff and how the emotional attachment to patients of non-physician staff could lead to inappropriate recertifications. Stakeholders claim that this risk could be mitigated by any hospice physician seeing the patient and informing the certifying physician. More importantly, the stakeholders referred to the MedPAC report discussion regarding concerns that a physician face-to-face encounter provision might not be feasible in rural areas where there were physician shortages. In recommending that non-

physician practitioners be allowed to perform the encounter, MedPAC identified a need to allow flexibility regarding the practitioner who performs the encounter, especially in rural areas. Commenters stated that MedPAC and the Congress intended for long-stay hospice patients to be seen by any hospice physician or NP prior to the 180-day recertification.

In this proposed rule, we propose to revise the policy finalized in the CY 2011 HH PPS final rule published on November 17, 2010.

Specifically, in the CY 2011 HH PPS final rule, we implemented section 3132(b) of the Affordable Care Act, which requires that beginning January 1, 2011, a hospice physician or NP have a face-to-face encounter with every hospice patient prior to the 180-day recertification of the patient's terminal illness to determine continued eligibility. In implementing this provision, in response to comments in the final rule, we stated that the hospice physician who performed the face-to-face encounter must be the same physician who recertifies the patient's terminal illness and composes the recertification narrative.

As a result of stakeholders concerns resulting from the final rule policy, we propose to remove this limitation in this proposed rule. We propose that any hospice physician can perform the face-to-face encounter regardless of whether that physician recertifies the patient's terminal illness and composes the recertification narrative. In keeping with this proposal, we also propose to change the regulatory text at 418.22(b)(4) to state that the attestation of the nurse practitioner or a non-certifying hospice physician shall state that the clinical findings of that encounter were provided to the certifying physician, for use in determining continued eligibility for hospice. This proposal reflects the Centers for Medicare and Medicaid Services' commitment to the general principles of the President's Executive Order released January 18, 2011 entitled "Improving Regulation and Regulatory Review", as it would reduce burden to hospices and hospice physicians and increase flexibility in areas of physician shortages. We are soliciting public comments on this proposal.

D. Technical Proposals and Clarification

1. Hospice Local Coverage Determinations

In the November 17, 2010 "CY 2011 Home Health Prospective Payment System Rate Update for Calendar Year 2011; Changes in Certification Requirements for Home Health Agencies and Hospices Final Rule", we implemented new requirements for a face-to-face encounter which were mandated by the Affordable Care Act of 2010. A commenter asked how the face-to-face encounter related to Local Coverage Determinations (LCDs), and if the expectation was that the physician would verify the patient's condition based on the LCDs. Other commenters asked for guidance regarding what the encounter should include (that is, elements that make up an encounter) for purposes of satisfying the requirement. When describing how to assess patients for recertification, our response cited the LCDs of several contractors (see 75 FR 70447–70448). The response also included common text from those LCDs related to clinical findings to use in making the assessment and determining whether a patient was terminally ill. We stated that the clinical findings should include evidence from the three following categories: (1) Decline in clinical status guidelines (for example, decline in systolic blood pressure to below 90 or progressive postural hypotension); (2) Non disease-specific base guidelines (that is, decline in functional status) as demonstrated by Karnofsky Performance Status or Palliative Performance Score and dependence in two or more activities of daily living; and (3) Co-morbidities. We would note that because the language was not mandatory, there was never any intention that this response have a legally binding effect on hospices. These are suggestions as to elements of a certification or recertification which could be deemed to be indicative of a terminal condition. However, this was not meant to be an exhaustive or exclusive list. Because there has been some confusion about the extent to which these items exclude other possible scenarios, we propose to clarify that the clinical findings included in the comment response were provided as an example of findings that can be used in determining continued medical eligibility for hospice care. The illustrative clinical findings mentioned above are not mandatory national policy. We reiterate that certification or recertification is based upon a physician's clinical judgment, and is not an exact science. Congress made this clear in section 322 of the Benefits Improvement and Protection Act of 2000 (BIPA), which says that the hospice certification of terminal illness "shall be based on the physician's or medical director's clinical judgment regarding the normal course of the individual's illness."

2. Definition of Hospice Employee

As noted above, in the November 17, 2010 "CY 2011 Home Health Prospective Payment System Rate Update for Calendar Year 2011; Changes in Certification Requirements for Home Health Agencies and Hospices Final Rule," we implemented new requirements for a face-to-face encounter, which were mandated by the Affordable Care Act. As part of that implementation, we required that a hospice physician or nurse practitioner must perform the face-to-face encounters. Several commenters asked us to clarify who is considered a "hospice physician or nurse practitioner" (see 75 FR 70443–70445). We stated that a hospice physician or nurse practitioner must be employed by the hospice, and that hospice physicians could also be working under arrangement with the hospice (i.e., contracted). We added that Section 418.3 defines a hospice employee as someone who is receiving a W–2 form from the hospice or who is a volunteer. The complete definition of a hospice employee at 418.3 is as follows: "Employee means a person who: (1) Works for the hospice and for whom the hospice is required to issue a W–2 form on his or her behalf; (2) if the hospice is a subdivision of an agency or organization, an employee of the agency or organization who is assigned to the hospice; or (3) is a volunteer under the jurisdiction of the hospice." We received a number of questions from the industry about the definition of an employee and whether it included personnel who were employed by an agency or organization that has a hospice subdivision and who were assigned to that hospice. We are clarifying that entire definition of employee given at 418.3 (shown above) applies. Therefore, if the hospice is a subdivision of an agency or organization, an employee of the agency or organization who is assigned to the hospice is a hospice employee.

3. Timeframe for Face-to-Face Encounters

In the November 17, 2010 "CY 2011 Home Health Prospective Payment System Rate Update for Calendar Year 2011; Changes in Certification Requirements for Home Health Agencies and Hospices Final Rule," we also implemented policies related to the timeframe for performing a face-to-face encounter. We cited the statutory language from section 3132 of the Affordable Care Act, which says that on and after January 1, 2011, a hospice physician or nurse practitioner must

have a face-to-face encounter with the beneficiary to determine continued eligibility of the beneficiary for hospice care prior to the 180th-day recertification and each subsequent recertification (see 75 FR 70435). We also defined the 180th-day recertification to be the recertification which occurs at the 3rd benefit period (see 75 FR 70436–70437). We implemented a requirement that the face-to-face encounter occur no more than 30 calendar days prior to the 3rd or later benefit periods, to allow hospices flexibility in scheduling the encounter (see 75 FR 70437–70439). We emphasized throughout the final rule that the encounter must occur "prior to" the 3rd benefit period recertification, and each subsequent recertification. The regulatory text associated with these changes is found at 42 CFR 418.22(a)(4), and reads, "As of January 1, 2011, a hospice physician or hospice nurse practitioner must have a face-to-face encounter with each hospice patient, whose total stay across all hospices is anticipated to reach the 3rd benefit period, no more than 30 calendar days prior to the 3rd benefit period recertification, and must have a face-to-face encounter with that patient no more than 30 calendar days prior to every recertification thereafter, to gather clinical findings to determine continued eligibility for hospice care." We believe our final policy states clearly that the face-to-face encounter must occur prior to, but no more than 30 calendar days prior to, the 3rd benefit period recertification and each subsequent recertification. However, we are concerned that our regulation text above could lead a hospice to believe that the face-to-face encounter could occur in an open-ended fashion after the start of a benefit period in which it is required, and that the limitation on the time-frame was only on how far in advance of the start of the benefit period that the encounter could occur. Our policy, as stated in the final rule, is that a face-to-face encounter is required prior to the 3rd benefit period recertification and each recertification thereafter (75 FR 70454). Therefore, we propose to revise the regulation text to more clearly state that the encounter is required "prior to" the 3rd benefit period recertification, and each subsequent recertification. As such, we propose to change the regulatory text to read "(4) *Face-to-face encounter.* As of January 1, 2011, a hospice physician or hospice nurse practitioner must have a face-to-face encounter with each hospice patient whose total stay across all hospices is anticipated to reach the 3rd benefit period. The face-to-face encounter must occur prior to but no more than 30 calendar days prior to the 3rd benefit period recertification, and every benefit period recertification thereafter, to gather clinical findings to determine continued eligibility for hospice care."

4. Hospice Aide and Homemaker Services

The hospice Conditions of Participation (CoPs) were updated in 2008, after being finalized on June 5, 2008 in the Hospice Conditions of Participation Final Rule (73 FR 32088). Those revised CoPs included changing the term "home health aide" to "hospice aide". In our FY 2010 Hospice Wage Index Final Rule (74 FR 39384), we updated language in several areas of our regulatory text to use this new terminology, including at 42 CFR 418.202(g). The regulatory text at 418.202(g) describes hospice aide and homemaker services. The last sentence of the regulatory text that was finalized is about homemaker services, however the word "homemaker" was inadvertently replaced with "aide". The revised regulatory text also inadvertently deleted the sentence which read "Aide services must be provided under the supervision of a registered nurse." Finally, the title of this section of the regulatory text continues to refer to section 418.94 of the CoPs. However, section 418.94 no longer exists, and was updated in the 2008 Hospice CoP Final Rule to section 418.76. We propose to correct the regulatory text at 418.202(g) to update the CoP reference to show section 418.76, to add back the sentence about supervision which was deleted, and to correct the last sentence to refer to "homemakers" rather than "aides."

E. Quality Reporting for Hospices

1. Background and Statutory Authority

CMS seeks to promote higher quality and more efficient health care for Medicare beneficiaries. Our efforts are furthered by the quality reporting programs coupled with public reporting of that information. Such quality reporting programs exist for various settings such as the Hospital Inpatient Quality Reporting (Hospital IQR) Program. In addition, CMS has implemented quality reporting programs for hospital outpatient services, the Hospital Outpatient Quality Data Reporting Program (HOP QDRP), and for physicians and other eligible professionals, the Physician Quality Reporting System (PQRS). CMS has also implemented quality reporting programs for home health agencies and skilled nursing facilities that are based on conditions of participation, and an end-stage renal disease quality improvement program that links payment to performance based on requirements in section 153(c) of the Medicare Improvement for Patients and Providers Act of 2008.

Section 3004 of the Affordable Care Act amends the Social Security Act to authorize additional quality reporting programs, including one for hospices. Section 1814(i)(5)(A)(i) of the Act requires that beginning with FY 2014 and each subsequent fiscal year, the Secretary shall reduce the market basket update by 2 percentage points for any hospice that does not comply with the quality data submission requirements with respect to that fiscal year. Depending on the amount of annual update for a particular year, a reduction of 2 percentage points may result in the annual market basket update being less than 0.0 percent for a fiscal year and may result in payment rates that are less than payment rates for the preceding fiscal year. Any reduction based on failure to comply with the reporting requirements, as required by section 1814(i)(5)(B) of the Act, would apply only with respect to the particular fiscal year involved. Any such reduction will not be cumulative and will not be taken into account in computing the payment amount for subsequent fiscal years.

Section 1814(i)(5)(C) of the Act requires that each hospice submit data to the Secretary on quality measures specified by the Secretary. Such data must be submitted in a form and manner, and at a time specified by the Secretary. Any measures selected by the Secretary must have been endorsed by the consensus-based entity which holds a contract regarding performance measurement with the Secretary under section 1890(a) of the Act. This contract is currently held by the National Quality Forum (NQF). However, Section 1814(i)(5)(D)(ii) provides that in the case of a specified area or medical topic determined appropriate by the Secretary for which a feasible and practical measure has not been endorsed by the consensus-based entity the Secretary may specify a measure(s) that is(are) not so endorsed as long as due consideration is given to measures that have been endorsed or adopted by a consensus-based organization identified by the Secretary. Under section 1814(i)(5)(D)(iii) of the Act, the Secretary must not later than October 1, 2012 publish selected measures that will be applicable with respect to FY 2014.

Section 1814(i)(5)(E) of the Act requires the Secretary to establish

procedures for making data submitted under the hospice quality reporting program available to the public. The Secretary must ensure that a hospice has the opportunity to review the data that is to be made public with respect to the hospice program prior to such data being made public. The Secretary must report quality measures that relate to hospice care provided by hospices on the Internet Web site of CMS.

2. Quality Measures for Hospice Quality Reporting Program for Payment Year FY 2014

a. Considerations in the Selection of the Proposed Quality Measures

In implementing these quality reporting programs, CMS envisions the comprehensive availability and widespread use of health care quality information for informed decision making and quality improvement. We seek to collect data in a manner that balances the need for information related to the full spectrum of quality performance and the need to minimize the burden of data collection and reporting. Our purpose is to help achieve better health care and improve health through the widespread dissemination and use of performance information. We seek to efficiently collect data using valid, reliable and relevant measures of quality and to share the information with organizations that use such performance information as well as with the public.

We also seek to align new Affordable Care Act reporting requirements with current HHS high priority conditions, topics and National Quality Strategy (NQS) goals and to ultimately provide a comprehensive assessment of the quality of health care delivered. The hospice quality reporting program will align with the HHS National Quality Strategy, particularly with the goals of ensuring person and family centered care and promoting effective communication and coordination of care. One fundamental element of hospice care is adherence to patient choice regarding such issues as desired level of treatment and location of care provision. This closely aligns with the HHS NQS goal of ensuring person and family centered care. Another fundamental element of hospice care is the use of a closely coordinated interdisciplinary team to provide the desired care. This characteristic is closely aligned with the goal of promoting effective communication and coordination of care. Patient/family preferences and coordination of care will be foci of future hospice quality measure selection. Arriving at such a comprehensive set of quality measures that reflect high priority conditions and goals of the HHS NQS will be a multi-year effort.

Other considerations in selecting measures include: Alignment with other Medicare and Medicaid quality reporting programs as well as other private sector initiatives; suggestions and input received on measures including, for example, those received during the Listening Session on the Hospice Quality Reporting Program held on November 15, 2010; seeking measures that have a low probability of causing unintended adverse consequences; and considering measures that are feasible (that is, measures that can be technically implemented within the capacity of the CMS infrastructure for data collection, analyses, and calculation of reporting and performance rates as applicable). We also considered the burden to hospices when selecting measures to propose. We considered the January 18, 2011 Executive Order entitled "Improving Regulation and Regulatory Review" (E.O. 13563), which instructs federal agencies to consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public.

In our search for measures appropriate for the first year of the Hospice Quality Reporting Program, we considered the results of our environmental scan, literature search, technical expert panel and stakeholder listening sessions that detailed measures developed by multiple stewards. Of particular interest were measures from the National Hospice and Palliative Care Organization (NHPCO), the PEACE Project conducted by The Carolinas Center for Medical Excellence 2006–2008 and the AIM Project conducted by the New York QIO, IPRO 2009–2010. Measures from these three sources can be viewed at the following Web sites: *http://ww.nhpco.org/files/public/Statistics_Research/NHPCO_research_flier.pdf, http://www.thecarolinascenter.org/default.aspx?pageid=46* and *http://www.ipro.org/index/cms-filesystem-action/hospice/1_6.pdf.*

We are investigating expanding our proposed measures to adopt some of these measures in the future. However, evaluation of these measures revealed unique measurement concerns for hospice services generally. Two major issues were identified. First, all of the measures currently available for use in measuring hospice quality of care are retrospective and have to be collected using a chart abstraction approach. This creates a burden for hospice providers. Secondly, there is no standardized vehicle for data collection or centralized structure for hospice quality reporting. We believe these issues limit our options for measure reporting in the first year of the Hospice Quality Reporting Program. Our plans to require additional measure reporting are described below under section 4. Additional Measures Under Consideration.

We considered measures currently endorsed by NQF that are applicable to hospice care. Of the nine measures listed by NQF as applicable to end of life care, seven address patients who specifically died of cancer and various situations experienced by those patients in their last days of life regardless of whether they were cared for by a hospice. These seven measures do not address the provision of hospice care or the breadth of the hospice patient population. The remaining two NQF endorsed hospice-related measures address measurement of the quality of care actually provided by hospices. One of the two hospice appropriate measures relates to pain control and is discussed below under section b. The other hospice appropriate measure, #0208: Percentage of family members of all patients enrolled in a hospice program who give satisfactory answers to the survey instrument requires the hospice to administer the Family Evaluation of Hospice Care (FEHC) survey to families of deceased hospice patients. The FEHC survey itself contains 54 questions to be returned to the hospice and analyzed/scored in order to produce a rating for the measure. Though the FEHC survey is available to all hospices, we are unable to determine the number of hospices that currently use this survey or the number that analyze the responses to determine scoring for this NQF endorsed measure. We believe that the efforts required for hospices to set up systems to utilize and analyze this survey tool can be burdensome for some hospices, and that the timeframe required to put the survey administration and evaluation process in place is insufficient. Therefore, while we do not propose to use this measure as a requirement for the FY 2014 payment update, this measure may be included in future quality reporting requirements because, should the level of burden prove to be acceptable, the family evaluation of hospice care is an important perspective on hospice quality. We are not aware of any other measures applicable to hospice care that have been endorsed or adopted by a consensus organization other than the NQF.

The current hospice Conditions of Participation (CoPs) at 42 CFR section 418.58 require that hospices develop,

implement, and maintain an effective, ongoing, hospice-wide data-driven quality assessment and performance improvement (QAPI) program and that the hospice maintain documentary evidence of its quality assessment and performance improvement program and be able to demonstrate its operation to CMS. In addition, hospices must measure, analyze, and track quality indicators, including adverse patient events, and other aspects of performance that enable the hospice to assess processes of care, hospice services, and operations as part of their QAPI Program.

Hospices have been required to have QAPI programs in place since December 2008 in order to comply with the CoPs. As a part of the QAPI regulations, since February 2, 2009, hospices have been required to develop, implement, and evaluate performance improvement projects. The regulations require that

(1) The number and scope of distinct performance improvement projects conducted annually, based on the needs of the hospice's population and internal organizational needs, reflect the scope, complexity, and past performance of the hospice's services and operations; and

(2) The hospice document what performance improvement projects are being conducted, the reasons for conducting these projects, and the measurable progress achieved on these projects.

b. Proposed Quality Measures for the Quality Reporting Program for Hospices

Proposed Quality Measures

To meet the quality reporting requirements for hospices for the FY 2014 payment determination as set forth in Section 1814(i)(5) of the Act, we propose that hospices report the NQF-endorsed measure that is related to pain management, NQF #0209: The percentage of patients who were uncomfortable because of pain on admission to hospice whose pain was brought under control within 48 hours. A primary goal of hospice care is to enable patients to be comfortable and free of pain, so that they may live each day as fully as possible. The provision of pain control to hospice patients is an essential function, a fundamental element of hospice care and therefore we believe the pain control measure, NQF #0209 is an important and appropriate measure for the hospice quality reporting program.

Additionally, to meet the quality reporting requirements for hospices for the FY 2014 payment determination as set forth in Section 1814(i)(5) of the Act, we propose that hospices also report one structural measure that is not endorsed by NQF. Structural measures assess the characteristics and capacity of the provider to deliver quality health care. The proposed structural measure is: Participation in a Quality Assessment and Performance Improvement (QAPI) Program that Includes at Least Three Quality Indicators Related to Patient Care. We believe that participation in QAPI programs that address at least three indicators related to patient care reflects a commitment not only to assessing the quality of care provided to patients but also to identifying opportunities for improvement that pertain to the care of patients. Examples of domains of indicators related to patient care include providing care in accordance with documented patient and family goals, effective and timely symptom management, care coordination, and patient safety.

Section 1814(i)(5)(D)(ii) provides that "[i]n the case of a specified area or medical topic determined appropriate by the Secretary for which a feasible measure has not been endorsed by an entity with a contract under section 1890(a), the Secretary may specify a measure that is not so endorsed as long as due consideration is given to measures that have been endorsed or adopted by a consensus organization identified by the Secretary." We have proposed to adopt this structural measure because we believe it is appropriate for use in evaluating the quality of care provided by hospices. As discussed above, a majority of the NQF-endorsed measures that relate to end of life care are not hospice-specific or, in the case of the FEHC survey instrument, that measure is too burdensome for hospices to implement for the FY 2014 payment determination. We are also not aware of any other measures applicable to the hospice setting that have been adopted by another consensus organization. Accordingly, we propose to adopt the structural measure under the authority in section 1814(i)(5)(D)(ii).

We propose that each hospice submit data on the proposed structural measure, including the description of each of their patient-care focused quality indicators (if applicable) to CMS by January 31, 2013 on a spreadsheet template to be prepared by CMS. Specifically, hospice programs would be required to report whether or not they have a QAPI program that addresses at least three indicators related to patient care. In addition, hospices would be required to list all of their patient care indicators. Hospice programs will be evaluated for purposes of the quality reporting program based on whether or not they respond, not on how they respond.

In addition, we propose a voluntary submission of the proposed structural measure (not for purposes of a payment determination or public reporting), including the description of each of their patient-care focused quality indicators to CMS by January 31, 2012 on a spreadsheet template to be prepared by CMS. Voluntary reporting of the structural measure data with specific quality indicators related to patient care to CMS will allow us to learn what the important patient care quality issues are for hospices and serves to provide useful information in the design and structure of the quality reporting program. Our intent is to require additional standardized and specific quality measures to be reported by hospices in subsequent years. We solicit comment on the measures proposed.

The proposed collection and submission of data on the proposed NQF-endorsed measure will be a new requirement for hospices. However, since the development, implementation and maintenance of an effective, ongoing, hospice-wide data driven quality assessment and performance improvement program have been requirements in the Medicare CoPs since 2008, we do not believe that the collection of the proposed structural measure on QAPI indicators would be considered new work. There are numerous data collection tools and quality indicators that are available to hospices through hospice industry associations and private companies. In addition to these options, hospices may choose to use the CMS-sponsored Hospice Assessment Intervention and Measurement (AIM) Project data elements, data dictionary, data collection tool, and quality indicator formulas that are freely available to all hospices, found at *http://www.ipro.org/index/hospice-aim*.

We invite comment on the proposed quality measurement approach including whether there are other quality measures currently available which may be appropriate and advisable for the hospice quality reporting program starting in FY2014. We will review and carefully consider the comments that we receive on the proposed measures for the first hospice quality reporting cycle as we prepare the final rule. We propose that hospices report the structural measure by January 2013 and the NQF measure #0209 by April 2013 in order to be used in the fiscal year 2014 payment determination. In addition, we propose that hospices voluntarily report the structural

measure by January 2012 for purposes of program development and design. It is important to note that the Affordable Care Act allows the Secretary until October 1, 2012 to publish the measures required to meet the FY 2014 reporting requirement. As such, we have the opportunity to also consider commenters' suggestions associated with this proposed rule in FY 2013 hospice rulemaking.

c. Proposed Timeline for Data Collection Under the Quality Reporting Program for Hospices

To meet the quality reporting requirements for hospices for the FY 2014 payment determination as set forth in Section 1814(i)(5) of the Act, we propose that the first hospice quality reporting cycle for the proposed NQF-endorsed measure and the proposed structural measure will consist of data collected from October 1, 2012 through December 31, 2012. This timeframe will permit us to determine whether each hospice is eligible to receive the full market basket update for FY 2014 based on a full quarter of data. This also provides sufficient time after the end of the data collection period to accurately determine each hospice's market basket update for FY 2014. We propose that all subsequent hospice quality reporting cycles would be based on the calendar-year basis (e.g., January 1, 2013 through December 31, 2013 for determination of the hospice market basket update for each hospice in FY 2015, etc.). We welcome comments on the proposed reporting cycle for the hospice quality reporting program.

To voluntarily submit the structural measure, we propose that the hospice voluntary quality reporting cycle will consist of data collected from October 1, 2011 through December 31, 2011. This timeframe will permit us to analyze the data to learn what the important patient care quality issues are for hospices as we enhance the quality reporting program design to require more standardized and specific quality measures to be reported by hospices in subsequent years.

d. Data Submission Requirements

We generally propose that hospices submit data in the fiscal year prior to the payment determination. For the fiscal year 2014 payment determination, we propose that hospices submit data for the proposed NQF-endorsed measure based on the measure specifications for that measure, which can be found at *http://www.qualityforum.org,* no later than April 1, 2013. Data submission for the structural measure would include the hospices' report of whether they have a QAPI program that addresses at least three indicators related to patient care, and, if so, the subject matter of all of their patient care indicators for the period October 1, 2012 through December 31, 2012. Submission of these reports would be required by January 31, 2013.

We propose that both measures' data be submitted to CMS on a spreadsheet template to be prepared by CMS. We will announce operational details with respect to the data submission methods and format for the hospice quality data reporting program using this CMS Web site *http://www.cms.gov/LTCH-IRF-Hospice-Quality-Reporting* by no later than December 31, 2011 should these measures be finalized.

For the voluntary submission, we propose that hospices submit data for the proposed structural measure based on the spreadsheet template to be prepared by CMS, no later than January 31, 2012. Voluntary data submission for the structural measure would include the hospices' report of whether they have a QAPI program that addresses at least three indicators related to patient care, and, if so, the subject matter of all of their patient care indicators for the period October 1, 2011 through December 31, 2011. Submission of these reports would be required by January 31, 2012.

3. Public Availability of Data Submitted

Under section 1814(i)(5)(E) of the Act, the Secretary is required to establish procedures for making any quality data submitted by hospices available to the public. Such procedures will ensure that a hospice will have the opportunity to review the data regarding the hospice's respective program before it is made public. Also, under section 1814(i)(5)(E) of the Act, the Secretary is authorized to report quality measures that relate to services furnished by a hospice on the CMS Internet Web site. At the time of the publication of this proposed rule, no date has been set for public reporting of data. We recognize that public reporting of quality data is a vital component of a robust quality reporting program and are fully committed to developing the necessary systems for public reporting of hospice quality data.

4. Additional Measures Under Consideration

As described above, we are considering expanding the proposed measures to include measures from the National Hospice and Palliative Care Organization (NHPCO), the PEACE Project and the AIM Project. While in this first year, we propose to build a foundation for quality reporting by requiring hospices to report one NQF endorsed measure and one structural measure, we seek to achieve a comprehensive set of quality measures to be available for widespread use for informed decision making and quality improvement. We expect to explore and expand the measures in various ways. Future topics under consideration for quality data reporting include patient safety, effective symptom management, patient and family experience of care, and alignment of care with patient preferences. For quality data reporting in FY2014 or FY2015, we are also particularly interested in the development of new measures related to these topics and in the further development of existing measures that can be found on the following Web sites: *http://www.nhpco.org/files/public/Statistics_Research/NHPCO_research_flier.pdf http://www.thecarolinascenter.org/default.aspx?pageid=46* and *http://www.ipro.org/index/cms-filesystem-action/hospice/1_6.pdf.*

We welcome comments on whether all, some, any, or none of these measures should be considered for future rulemaking. We also solicit comments on ways which CMS can adopt these measures in a standardized way that is not overly burdensome to hospice providers and reflects hospice patient input.

To support the standardized collection and calculation of quality measures specifically focused on hospice services, we believe the required data elements would potentially require a standardized assessment instrument.

CMS has developed an assessment instrument for the "Post-Acute Care Payment Reform Demonstration Program," as required by section 5008 of the 2005 Deficit Reduction Act (DRA). This is a standardized assessment instrument that could be used across all post-acute care sites to measure functional status and other factors during treatment and at discharge from each provider and to test the usefulness of this standardized assessment instrument (now referred to as the Continuity Assessment Record & Evaluation, CARE). We believe such an assessment instrument would be beneficial in supporting the submission of data on quality measures by requiring standardized data with regard to hospice patients, similar to the current MDS 3.0 and OASIS–C that support a variety of quality measures for nursing homes and home health agencies, respectively. The CARE data set used by hospices would require editing to

address the unique and specific assessment needs of the hospice patient population. We invite comments on the implementation of a standardized assessment instrument for hospices that would similarly support the calculation of quality measures.

We invite public comment on considering modifications to the CARE data set to capture information specifically relevant to measuring the quality of care and services delivered by hospices such as patient/family preferences and the degree to which those preferences were met for care delivery, symptom management, spiritual needs and other aspects of care pertinent to the hospice patient population. The current version of the CARE data set can be found at *www.pacdemo.rti.org*.

Finally, we are also soliciting comments on ways which CMS can expand the structural reporting measure to also include hospice performance on each QAPI indicator reported in the performance period.

IV. Updates on Issues Not Proposed for Rulemaking for FY 2012 Rulemaking

A. Update on Hospice Payment Reform and Value Based Purchasing

Section 3132 of the Affordable Care Act of 2010 (Pub. L. 111–148) authorized the Secretary to collect additional data and information determined appropriate to revise payments for hospice care and for other purposes. The types of data and information described in the Affordable Care Act attempt to capture resource utilization, which can be collected on claims, cost reports, and possibly other mechanisms as we determine to be appropriate. The data collected would be used to revise hospice payment methodology or routine home care rates in a budget-neutral manner no earlier than October 1, 2013. In order to determine the revised hospice payment methodology and types of data to be collected, we will consult with hospice programs and the Medicare Payment Advisory Commission (MedPAC).

According to MedPAC's March 2011 "Report to Congress: Medicare Payment Policy" (available at *http://www.medpac.gov/chapters/Mar10_Ch02E.pdf*), Medicare expenditures for hospice services exceeded $12 billion in 2009 and the aggregate Medicare margin in 2008 was 5.1 percent. In addition, MedPAC found a 50 percent growth in the number of hospices from 2000 to 2009, of which a majority were for-profit hospices. The growth in Medicare expenditures, margins, and number of new hospices raises concern that the current hospice payment methodology may have created unintended incentives. Over the past several years, MedPAC, the Government Accountability Office (GAO), and the Office of Inspector General (OIG) all recommended that CMS collect more comprehensive data in order to better assess the utilization of the Medicare hospice benefit. MedPAC has also suggested an alternative payment model that they believe will address the vulnerabilities in the current payment system.

We are in the early stages of reform analysis. We have conducted a literature review, are in the process of conducting initial data analysis, and our contractor will convene a technical advisory panel in the spring of 2011. We are also working in collaboration with the Assistant Secretary of Planning and Evaluation to develop analysis that may be used to inform the technical advisory panel discussions. We hope to share the study design in future rulemaking to solicit public comments on the hospice payment reform methodology.

Section 10326 of the Affordable Care Act directs the Secretary to conduct a pilot program to test a value-based purchasing program for hospices no later than January 1, 2016. As described in Section III E. Quality Reporting for Hospices above, in this rule we have proposed two measures for hospices to report to CMS no later than January 31, 2013. We believe that these measures are a quality reporting foundation upon which CMS will expand. Over the course of the next few years, no later than beginning in FY 2015, CMS will require hospices to report an expanded and comprehensive set of quality measures from which CMS can select for pilot testing a value-based purchasing program. During the FY 2013, FY 2014 and FY 2015 hospice rulemaking, CMS plans to iteratively implement the expanded measures, and solicit industry comments regarding analysis and design options for a hospice value-based purchasing pilot which would improve the quality of care while reducing spending. We will also consult with stakeholders in developing the implementation plan, as well as considering the outcomes of any recent demonstration projects related to value-based purchasing which we believe might be relevant to the hospice setting. We will provide further information on the progress of our efforts in future rulemaking.

B. Update on the Redesigned Provider Statistical & Reimbursement Report (PS&R)

In our FY 2011 Hospice Wage Index Notice with Comment Period, we solicited comments on a redesigned PS&R system, which would allow hospices easy access to national hospice utilization data on their Medicare hospice beneficiaries. As described in section II of this proposed rule, some commenters were supportive of the idea, and said they needed access to each beneficiary's full utilization history to better manage their caps and to meet the new face-to-face requirements.

We are moving forward with this project, and expect the redesigned PS&R system to be able to provide complete utilization data needed for calculating hospice caps. We believe that the redesigned PS&R system will provide hospices with a greater ability to monitor their caps by providing readily accessible information on beneficiary utilization. We expect it to be available to hospices before year's end. We encourage all hospices to become familiar with the redesigned PS&R and to use the information it will make available in managing their respective caps. In the future, we may consider requiring hospices to self-report their caps, using PS&R data.

V. Collection of Information Requirements

Under the Paperwork Reduction Act of 1995, we are required to provide 60-day notice in the **Federal Register** and solicit public comment before a collection of information requirement is submitted to the Office of Management and Budget (OMB) for review and approval. In order to fairly evaluate whether an information collection should be approved by OMB, section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995 requires that we solicit comment on the following issues:

- The need for the information collection and its usefulness in carrying out the proper functions of our agency.
- The accuracy of our estimate of the information collection burden.
- The quality, utility, and clarity of the information to be collected.
- Recommendations to minimize the information collection burden on the affected public, including automated collection techniques.

We are soliciting public comment on each of these issues in this proposed rule.

Proposed Quality Measures for the Quality Reporting Program for Hospices

Section 1814(i)(5)(C) of the Social Security Act requires that each hospice

must submit data to the Secretary on quality measures specified by the Secretary. Such data must be submitted in a form and manner, and at a time specified by the Secretary. Under section 1814(i)(5)(D)(iii) of the Act, the Secretary must not later than October 1, 2012 publish selected measures that will be applicable with respect to FY 2014.

In implementing the Hospice quality reporting program, CMS seeks to collect measure information with as little burden to the providers as possible and which reflects the full spectrum of quality performance. Our purpose in collecting this data is to help achieve better health care and improve health through the widespread dissemination and use of performance information.

A. Structural Measure: Participation in a Quality Assessment Performance Improvement Program That Includes at Least Three Indicators Related to Patient Care

Consistent with this proposed rule, hospices will voluntarily report to CMS by January 31, 2012 their participation in a QAPI program that includes the hospices' report of whether they have a QAPI program that addresses at least three indicators related to patient care, and if so, the subject matter of all of their patient care indicators during the time frame October 1 through December 31, 2011. Data submitted for the last quarter of calendar year 2011 shall be voluntary on the part of hospice providers and shall not impact their fiscal year 2014 payment determination.

The information that hospices will be required to report, in both the voluntary and mandatory phases of reporting, consists of stating whether or not they participate in a QAPI program that includes at least three indicators related to patient care and if so, the subject matter of all of their patient care indicators. Expectations of the QAPI programs are set forth in the Hospice Conditions of Participation (CoPs) at 42 CFR 418.58(a) through 418.58(e). These conditions of participation require that hospices must develop, implement, and maintain an effective, ongoing, hospice-wide, data-driven QAPI program and that the hospice must maintain documentary evidence of its QAPI programs. Hospices have been required to meet all of the standards set forth in 42 CFR 418.58(a) through 418.58(e) as a condition of participation in the Medicare and Medicaid programs since 2008. Therefore, the identification of quality indicators related to patient care, will not be considered new or additional work.

Under the proposed quality reporting program, hospices will voluntarily report to CMS by no later than January 31, 2012, data that would include whether they have a QAPI program that addresses at least three indicators related to patient care, and if so, the subject matter of all of their patient care indicators during the time frame via a CMS-prepared spreadsheet template. CMS anticipates that this reporting will take no more than 15 minutes of time to prepare the structural measure report.

Thereafter, each of the 3,531 hospices in the United States will be required to submit this structural measure information to CMS one time per year. CMS estimates that it will take approximately 15 minutes to prepare and complete the submission of this structural measure report. Therefore, the estimated number of hours spent by all hospices in the U.S. preparing and submitting such data totals 883 hours. CMS believes that the compilation and transmission of the data can be completed by data entry personnel. We have estimated a total cost impact of $18,163 to all hospices for the implementation of the hospice structural measure quality reporting program, based on 883 total hours for a billing clerk at $20.57/hour (which includes 30 percent overhead and fringe benefits, using most recent BLS wage data). We have developed an information collection request for OMB review and approval.

B. NQF Measure #0209: Percentage of Patients Who Were Uncomfortable Because of Pain on Admission to Hospice Whose Pain Was Brought Under Control Within 48 Hours

At this time, CMS has not completed development of the information collection instrument that Hospices would have to submit in order to comply with the NQF measure #0209 reporting requirements as discussed earlier in this proposed rule. Because the instrument for the reporting of this measure is still under development, we cannot assign a complete burden estimate at this time. Once the instrument is available, we will publish the required 60-day and 30-day **Federal Register** notices to solicit public comments on the data submission form and to announce the submission of the information collection request to OMB for its review and approval. The data collection of the NQF measure #0209 for the fiscal year 2014 payment determination is for the time period from October 1, 2012 to December 31, 2012.

If you comment on these information collection and recordkeeping requirements, please do either of the following:

1. Submit your comments electronically as specified in the **ADDRESSES** section of this proposed rule; or

2. Submit your comments to the Office of Information and Regulatory Affairs, Office of Management and Budget, Attention: CMS Desk Officer, CMS–1355–P, Fax: (202) 395–6974; or E-mail: *OIRA_submission@omb.eop.gov.*

VI. Response to Comments

Because of the large number of public comments we normally receive on **Federal Register** documents, we are not able to acknowledge or respond to them individually. We will consider all comments we receive by the date and time specified in the **DATES** section of this preamble, and, when we proceed with a subsequent document, we will respond to the comments in the preamble to that document.

VII. Economic Analyses

A. Regulatory Impact Analysis

1. Introduction

We have examined the impacts of this proposed rule as required by Executive Order 12866 (September 30, 1993, Regulatory Planning and Review), Executive Order 13563 on Improving Regulation and Regulatory Review (January 18, 2011), the Regulatory Flexibility Act (September 19, 1980; Pub. L. 96–354) (RFA), section 1102(b) of the Social Security Act, section 202 of the Unfunded Mandates Reform Act of 1995 (March 22, 1995; Pub. L. 104–4), Executive Order 13132 on Federalism (August 4, 1999), and the Congressional Review Act (5 U.S.C. 804(2)).

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This rule has not been designated an "economically" significant rule, under section 3(f)(1) of Executive Order 12866. However, we have voluntarily prepared a Regulatory Impact Analysis that to the best of our ability presents the costs and benefits of this proposed rule.

2. Statement of Need

This proposed rule follows § 418.306(c) which requires annual publication, in the **Federal Register**, of the hospice wage index based on the most current available CMS hospital wage data, including any changes to the definitions of Metropolitan Statistical Areas (MSAs). Also, it implements Section 3004 of the Affordable Care Act of 2010, which directs the Secretary to specify quality measures for the hospice program. Lastly, this proposed rule includes proposed changes to the aggregate cap calculation, to requirements related to physicians who perform face-to-face encounters, and offers several clarifying technical corrections.

3. Overall Impacts

The overall impact of this proposed rule is an estimated net decrease in Federal payments to hospices of $80 million for fiscal year 2012. We estimated the impact on hospices, as a result of the changes to the FY 2012 hospice wage index and of reducing the BNAF by an additional 15 percent, for a total BNAF reduction of 40 percent (10 percent in FY 2010, 15 percent in FY 2011, and 15 percent in FY 2012). The BNAF reduction is part of a 7-year BNAF phase-out that was finalized in previous rulemaking (74 FR 39384 (August 6, 2009)), and is not a policy change.

As discussed previously, the methodology for computing the hospice wage index was determined through a negotiated rulemaking committee and promulgated in the August 8, 1997 hospice wage index final rule (62 FR 42860). The BNAF, which was promulgated in the August 8, 1997 rule, is being phased out. This rule updates the hospice wage index in accordance with the 2010 Hospice Wage Index final rule, which finalized a 10 percent reduced BNAF for FY 2010 as the first year of a 7-year phase-out of the BNAF, to be followed by an additional 15 percent per year reduction in the BNAF in each of the next 6 years. Total phase-out will be complete by FY 2016.

4. Detailed Economic Analysis

Column 4 of Table 1 shows the combined effects of the updated wage data (the 2011 pre-floor, pre-reclassified hospital wage index) and of the additional 15 percent reduction in the BNAF (for a total BNAF reduction of 40 percent), comparing estimated payments for FY 2012 to estimated payments for FY 2011. The FY 2011 payments used for comparison have a 25 percent reduced BNAF applied. We estimate that the total hospice payments for FY 2012 will decrease by $80 million as a result of the application of the updated wage data ($+10 million) and the total 40 percent reduction in the BNAF ($ − 90 million). This estimate does not take into account any inpatient hospital market basket update, which is estimated to be 2.8 percent for FY 2012. This estimated 2.8 percent does not reflect the provision in the Affordable Care Act which reduces the inpatient hospital market basket update for FY 2012 by 0.1 percentage point, since that reduction does not apply to hospices. The final inpatient hospital market basket update and associated payment rates will be communicated through an administrative instruction in the summer. The effect of an estimated 2.8 percent inpatient hospital market basket update on payments to hospices is approximately $390 million. Taking into account an estimated 2.8 percent inpatient hospital market basket update (+$390 million), in addition to the updated wage data ($+10 million) and the total 40 percent reduction in the BNAF ($ − 90 million), it is estimated that hospice payments would increase by $310 million in FY 2012 ($390 million + $10 million − $90 million = $310 million). The percent change in payments to hospices due to the combined effects of the updated wage data, the additional 15 percent reduction in the BNAF (for a total BNAF reduction of 40 percent), and the inpatient hospital market basket update of 2.8 percent is reflected in column 5 of the impact table (Table 1).

a. Effects on Hospices

This section discusses the impact of the projected effects of the hospice wage index, including the effects of an estimated 2.8 percent inpatient hospital market basket update for FY 2012 that will be communicated separately through an administrative instruction. This proposed rule continues to use the CBSA-based pre-floor, pre-reclassified hospital wage index as a basis for the hospice wage index and continues to use the same policies for treatment of areas (rural and urban) without hospital wage data. The proposed FY 2012 hospice wage index is based upon the 2011 pre-floor, pre-reclassified hospital wage index and the most complete claims data available (FY 2009) with an additional 15 percent reduction in the BNAF (combined with the 10 percent reduction in the BNAF taken in FY 2010, and the additional 15 percent taken in 2011, for a total BNAF reduction of 40 percent in FY 2012). The BNAF reduction is part of a 7-year BNAF phase-out that was finalized in previous rulemaking, and would not be a policy change.

For the purposes of our impacts, our baseline is estimated FY 2011 payments with a 25 percent BNAF reduction, using the 2010 pre-floor, pre-reclassified hospital wage index. Our first comparison (column 3, Table 1) compares our baseline to estimated FY 2012 payments (holding payment rates constant) using the updated wage data (2011 pre-floor, pre-reclassified hospital wage index). Consequently, the estimated effects illustrated in column 3 of Table 1 show the distributional effects of the updated wage data only. The effects of using the updated wage data combined with the additional 15 percent reduction in the BNAF are illustrated in column 4 of Table 1.

We have included a comparison of the combined effects of the additional 15 percent BNAF reduction, the updated wage data, and an estimated 2.8 percent inpatient hospital market basket update for FY 2012 (Table 1, column 5). Presenting these data gives the hospice industry a more complete picture of the effects on their total revenue of the hospice wage index discussed in this proposed rule, the BNAF phase-out, and the estimated FY 2012 inpatient hospital market basket update. Certain events may limit the scope or accuracy of our impact analysis, because such an analysis is susceptible to forecasting errors due to other changes in the forecasted impact time period. The nature of the Medicare program is such that the changes may interact, and the complexity of the interaction of these changes could make it difficult to predict accurately the full scope of the impact upon hospices.

TABLE 1—ANTICIPATED IMPACT ON MEDICARE HOSPICE PAYMENTS OF UPDATING THE PRE-FLOOR, PRE-RECLASSIFIED HOSPITAL WAGE INDEX DATA, REDUCING THE BUDGET NEUTRALITY ADJUSTMENT FACTOR (BNAF) BY AN ADDITIONAL 15 PERCENT (FOR A TOTAL BNAF REDUCTION OF 40 PERCENT) AND APPLYING AN ESTIMATED 2.8 PERCENT † INPATIENT HOSPITAL MARKET BASKET UPDATE TO THE FY 2012 HOSPICE WAGE INDEX, COMPARED TO THE FY 2011 HOSPICE WAGE INDEX WITH A 25 PERCENT BNAF REDUCTION

	Number of hospices	Number of routine home care days in thousands	Percent change in hospice payments due to FY2012 wage index change	Percent change in hospice payments due to wage index change, and additional 15% reduction in BNAF	Percent change in hospice payments due to wage index change, additional 15% reduction in BNAF, and market basket update
	(1)	(2)	(3)	(4)	(5)
ALL HOSPICES	3,440	74,900	0.1	(0.5)	2.3
URBAN HOSPICES	2,388	64,816	0.1	(0.5)	2.3
RURAL HOSPICES	1,052	10,084	(0.2)	(0.6)	2.2
BY REGION—URBAN:					
NEW ENGLAND	133	2,425	(0.7)	(1.3)	1.5
MIDDLE ATLANTIC	239	7,131	(0.3)	(0.9)	1.9
SOUTH ATLANTIC	347	14,247	0.3	(0.3)	2.5
EAST NORTH CENTRAL	328	9,191	0.2	(0.4)	2.4
EAST SOUTH CENTRAL	177	4,420	(0.1)	(0.6)	2.2
WEST NORTH CENTRAL	180	4,280	(0.3)	(0.8)	1.9
WEST SOUTH CENTRAL	461	8,657	0.1	(0.4)	2.4
MOUNTAIN	222	5,633	(0.0)	(0.6)	2.2
PACIFIC	264	7,606	0.6	(0.0)	2.8
OUTLYING	37	1,227	(0.4)	(0.4)	2.4
BY REGION—RURAL:					
NEW ENGLAND	26	193	(0.1)	(0.6)	2.1
MIDDLE ATLANTIC	45	517	0.4	(0.2)	2.6
SOUTH ATLANTIC	136	2,106	(0.7)	(1.1)	1.6
EAST NORTH CENTRAL	147	1,706	(0.6)	(1.1)	1.6
EAST SOUTH CENTRAL	153	1,958	0.1	(0.1)	2.7
WEST NORTH CENTRAL	194	1,085	(0.5)	(0.9)	1.9
WEST SOUTH CENTRAL	189	1,498	0.8	0.4	3.2
MOUNTAIN	109	585	0.3	(0.1)	2.7
PACIFIC	52	428	(0.7)	(1.3)	1.5
OUTLYING	1	10	0.0	0.0	2.8
ROUTINE HOME CARE DAYS:					
0–3499 DAYS (small)	621	1,077	(0.1)	(0.6)	2.2
3500–19,999 DAYS (medium)	1716	17,231	(0.1)	(0.6)	2.2
20,000+ DAYS (large)	1103	56,591	0.1	(0.5)	2.3
TYPE OF OWNERSHIP:					
VOLUNTARY	1172	29,742	0.0	(0.5)	2.3
PROPRIETARY	1796	38,047	0.1	(0.4)	2.4
GOVERNMENT	472	7,111	(0.1)	(0.7)	2.1
HOSPICE BASE:					
FREESTANDING	2340	58,510	0.1	(0.5)	2.3
HOME HEALTH AGENCY	555	9,922	0.1	(0.5)	2.3
HOSPITAL	526	6,272	(0.0)	(0.6)	2.2
SKILLED NURSING FACILITY	19	196	0.2	(0.4)	2.4

BNAF = Budget Neutrality Adjustment Factor.
Comparison is to FY 2011 data with a 25 percent BNAF reduction.
* OSCAR data as of January 6, 2011 for hospices with claims filed in FY 2009.
** In previous years, there was also a category labeled "Other"; these were Other Government hospices, and have been combined with the "Government" category.
† The estimated 2.8 percent inpatient hospital market basket update for FY 2012 does not reflect the provision in the Affordable Care Act which reduces the inpatient hospital market basket update by 0.1 percentage point since that reduction does not apply to hospices.
REGION KEY: New England = Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, Vermont; Middle Atlantic = Pennsylvania, New Jersey, New York; South Atlantic = Delaware, District of Columbia, Florida, Georgia, Maryland, North Carolina, South Carolina, Virginia, West Virginia; East North Central = Illinois, Indiana, Michigan, Ohio, Wisconsin; East South Central = Alabama, Kentucky, Mississippi, Tennessee; West North Central = Iowa, Kansas, Minnesota, Missouri, Nebraska, North Dakota, South Dakota; West South Central = Arkansas, Louisiana, Oklahoma, Texas; Mountain = Arizona, Colorado, Idaho, Montana, Nevada, New Mexico, Utah, Wyoming; Pacific = Alaska, California, Hawaii, Oregon, Washington; Outlying = Guam, Puerto Rico, Virgin Islands.

Table 1 shows the results of our analysis. In column 1, we indicate the number of hospices included in our analysis as of January 6, 2011 which had also filed claims in FY 2009. In column 2, we indicate the number of routine

home care days that were included in our analysis, although the analysis was performed on all types of hospice care. Columns 3, 4, and 5 compare FY 2012 estimated payments with those estimated for FY 2011. The estimated FY 2011 payments incorporate a BNAF which has been reduced by 25 percent. Column 3 shows the percentage change in estimated Medicare payments for FY 2012 due to the effects of the updated wage data only, compared with estimated FY 2011 payments. The effect of the updated wage data can vary from region to region depending on the fluctuations in the wage index values of the pre-floor, pre-reclassified hospital wage index. Column 4 shows the percentage change in estimated hospice payments from FY 2011 to FY 2012 due to the combined effects of using the updated wage data and reducing the BNAF by an additional 15 percent. Column 5 shows the percentage change in estimated hospice payments from FY 2011 to FY 2012 due to the combined effects of using updated wage data, an additional 15 percent BNAF reduction, and an estimated 2.8 percent inpatient hospital market basket update.

Table 1 also categorizes hospices by various geographic and hospice characteristics. The first row of data displays the aggregate result of the impact for all Medicare-certified hospices. The second and third rows of the table categorize hospices according to their geographic location (urban and rural). Our analysis indicated that there are 2,388 hospices located in urban areas and 1,052 hospices located in rural areas. The next two row groupings in the table indicate the number of hospices by census region, also broken down by urban and rural hospices. The next grouping shows the impact on hospices based on the size of the hospice's program. We determined that the majority of hospice payments are made at the routine home care rate. Therefore, we based the size of each individual hospice's program on the number of routine home care days provided in FY 2009. The next grouping shows the impact on hospices by type of ownership. The final grouping shows the impact on hospices defined by whether they are provider-based or freestanding.

As indicated in Table 1, there are 3,440 hospices. Approximately 48 percent of Medicare-certified hospices are identified as voluntary (non-profit) or government agencies. Because the National Hospice and Palliative Care Organization estimates that approximately 83 percent of hospice patients in 2009 were Medicare beneficiaries, we have not considered other sources of revenue in this analysis.

As stated previously, the following discussions are limited to demonstrating trends rather than projected dollars. We used the pre-floor, pre-reclassified hospital wage indexes as well as the most complete claims data available (FY 2009) in developing the impact analysis. The FY 2012 payment rates will be adjusted to reflect the full inpatient hospital market basket update, as required by section 1814(i)(1)(C)(ii)(VII) of the Act. As previously noted, we publish these rates through administrative instructions rather than in a proposed rule. The FY 2012 estimated inpatient hospital market basket update is 2.8 percent. This 2.8 percent does not reflect the provision in the Affordable Care Act which reduces the inpatient hospital market basket update by 0.1 percentage point since that reduction does not apply to hospices. Since the inclusion of the effect of an inpatient hospital market basket increase provides a more complete picture of projected total hospice payments for FY 2012, the last column of Table 1 shows the combined impacts of the updated wage data, the additional 15 percent BNAF reduction, and the estimated 2.8 percent inpatient hospital market basket update. As discussed in the FY 2006 hospice wage index final rule (70 FR 45129), hospice agencies may use multiple hospice wage index values to compute their payments based on potentially different geographic locations. Before January 1, 2008, the location of the beneficiary was used to determine the CBSA for routine and continuous home care and the location of the hospice agency was used to determine the CBSA for respite and general inpatient care. Beginning January 1, 2008, the hospice wage index CBSA utilized is based on the location of the site of service. As the location of the beneficiary's home and the location of the facility may vary, there will still be variability in geographic location for an individual hospice. We anticipate that the CBSA of the various sites of service will usually correspond with the CBSA of the geographic location of the hospice, and thus we will continue to use the location of the hospice for our analyses of the impact of the changes to the hospice wage index in this rule. For this analysis, we use payments to the hospice in the aggregate based on the location of the hospice.

The impact of hospice wage index changes has been analyzed according to the type of hospice, geographic location, type of ownership, hospice base, and size. Our analysis shows that most hospices are in urban areas and provide the vast majority of routine home care days. Most hospices are medium-sized followed by large hospices. Hospices are almost equal in numbers by ownership with 1,644 designated as non-profit or government hospices and 1,796 as proprietary. The vast majority of hospices are freestanding.

b. Hospice Size

Under the Medicare hospice benefit, hospices can provide four different levels of care days. The majority of the days provided by a hospice are routine home care (RHC) days, representing about 97 percent of the services provided by a hospice. Therefore, the number of RHC days can be used as a proxy for the size of the hospice, that is, the more days of care provided, the larger the hospice. As discussed in the August 4, 2005 final rule, we currently use three size designations to present the impact analyses. The three categories are: (1) Small agencies having 0 to 3,499 RHC days; (2) medium agencies having 3,500 to 19,999 RHC days; and (3) large agencies having 20,000 or more RHC days. The FY 2012 updated wage data without any BNAF reduction are anticipated to decrease payments to small and medium hospices by 0.1 percent and increase payments to large hospices by 0.1 percent (column 3); the updated wage data and the additional 15 percent BNAF reduction (for a total BNAF reduction of 40 percent) are anticipated to decrease estimated payments to small and medium hospices by 0.6 percent, and to large hospices by 0.5 percent (column 4); and finally, the updated wage data, the additional 15 percent BNAF reduction (for a total BNAF reduction of 40 percent), and the estimated 2.8 percent inpatient hospital market basket update are projected to increase estimated payments by 2.2 percent for small and medium hospices, and by 2.3 percent for large hospices (column 5).

c. Geographic Location

Column 3 of Table 1 shows updated wage data without the BNAF reduction. Urban hospices are anticipated to experience an increase of 0.1 percent, while rural hospices will experience a decrease of 0.2 percent. Urban hospices can anticipate a decrease in payments in five regions; ranging from 0.7 percent in the New England region to 0.1 percent in the East South Central region. Payments in the Mountain region are estimated to stay stable. Urban hospices are anticipated to see an increase in payments in four regions; ranging from 0.1 percent in the West South Central

region to 0.6 percent in the Pacific region.

Column 3 shows estimated percentages for rural hospices. Rural hospices are estimated to see a decrease in payments in five regions, ranging from 0.7 percent in the South Atlantic and Pacific regions to 0.1 percent in the New England region. Rural hospices can anticipate an increase in payments in four regions, ranging from 0.1 percent in the East South Central region to 0.8 percent in the West South Central region. There is no change in payments for Outlying regions due to FY 2012 Wage Index change.

Column 4 shows the combined effect of the updated wage data and the additional 15 percent BNAF reduction on estimated payments, as compared to the FY 2011 estimated payments using a BNAF with a 25 percent reduction. Overall urban are anticipated to experience a 0.5 percent decrease in payments while rural hospices are anticipated to experience a 0.6 percent decrease in payments. Nine regions in urban areas are estimated to see decreases in payments, ranging from 1.3 percent in the New England region to 0.3 percent in the South Atlantic region. Payments for the Pacific region are estimated to be relatively stable.

Rural hospices are estimated to experience a decrease in payments in eight regions, ranging from 1.3 percent in the Pacific region to 0.1 percent in the East South Central and Mountain regions. While the estimated effect of the additional 15 percent BNAF reduction decreased payments to rural hospices in the West South Central region, hospices in this region are still anticipated to experience an estimated increase in payments of 0.4 percent due to the net effect of the reduced BNAF and the updated wage index data. Payments to rural outlying regions are anticipated to remain relatively stable.

Column 5 shows the combined effects of the updated wage data, the additional 15 percent BNAF reduction, and the estimated 2.8 percent inpatient hospital market basket update on estimated payments as compared to the estimated FY 2011 payments. Note that the FY 2011 payments had a 25 percent BNAF reduction applied to them. Overall, urban hospices are anticipated to experience a 2.3 percent increase in payments and rural hospices are anticipated to experience a 2.2 percent increase in payments. Urban hospices are anticipated to experience an increase in estimated payments in every region, ranging from 1.5 percent in the New England region to 2.8 percent in the Pacific region. Rural hospices in every region are estimated to see an increase in payments, ranging from 1.5 percent in the Pacific region to 3.2 percent in the West South Central region.

d. Type of Ownership

Column 3 demonstrates the effect of the updated wage data on FY 2012 estimated payments, versus FY 2011 estimated payments. We anticipate that using the updated wage data would decrease estimated payments to government hospices by 0.1 percent and payments to voluntary (non-profit) hospices would remain relatively unchanged. We estimate an increase in payments for proprietary (for-profit) hospices of 0.1 percent.

Column 4 demonstrates the combined effects of the updated wage data and of the additional 15 percent BNAF reduction. Estimated payments to voluntary (non-profit) hospices are anticipated to decrease by 0.5 percent, while government hospices are anticipated to experience a decrease of 0.7 percent. Estimated payments to proprietary (for-profit) hospices are anticipated to decrease by 0.4 percent.

Column 5 shows the combined effects of the updated wage data, the additional 15 percent BNAF reduction (for a total BNAF reduction of 40 percent), and an estimated 2.8 percent inpatient hospital market basket update on estimated payments, comparing FY 2012 to FY 2011 (using a BNAF with a 25 percent reduction). Estimated FY 2012 payments are anticipated to increase 2.3 percent for voluntary (non-profit), 2.1 percent for government hospices, and 2.4 percent for proprietary (for-profit) hospices.

e. Hospice Base

Column 3 demonstrates the effect of using the updated wage data, comparing estimated payments for FY 2012 to FY 2011. Estimated payments are anticipated to increase by 0.1 percent for freestanding hospices and home health agency based hospices, and 0.2 percent for hospices based out of a skilled nursing facility. Payments to hospital based hospices are estimated to remain relatively unchanged.

Column 4 shows the combined effects of the updated wage data and reducing the BNAF by an additional 15 percent, comparing estimated payments for FY 2012 to FY 2011. All hospice facilities are anticipated to experience decrease in payments ranging from 0.4 percent for skilled nursing facility based hospices, to 0.6 percent for hospital based hospices.

Column 5 shows the combined effects of the updated wage data, the additional 15 percent BNAF reduction, and an estimated 2.8 percent inpatient hospital market basket update on estimated payments, comparing FY 2012 to FY 2011. Estimated payments are anticipated to increase for all hospices, ranging from 2.2 percent for hospital based hospices to 2.4 percent for skilled nursing facility based hospices.

f. Effects on Other Providers

This proposed rule only affects Medicare hospices, and therefore has no effect on other provider types.

g. Effects on the Medicare and Medicaid Programs

This proposed rule only affects Medicare hospices, and therefore has no effect on Medicaid programs. As described previously, estimated Medicare payments to hospices in FY 2012 are anticipated to increase by $10 million due to the update in the wage index data, and to decrease by $90 million due to the total 40 percent reduction in the BNAF. However, the estimated market basket update of 2.8 percent is anticipated to increase Medicare payments by $390 million. Therefore, the total effect on Medicare hospice payments is estimated to be a $310 million increase. Note that the final market basket update and associated FY 2012 payment rates will be officially communicated this summer through an administrative instruction.

h. Accounting Statement

As required by OMB Circular A–4 (available at *http://www.whitehouse.gov/omb/circulars/a004/a-4.pdf*), in Table 2 below, we have prepared an accounting statement showing the classification of the expenditures associated with the provisions of this proposed rule. This table provides our best estimate of the decrease in Medicare payments under the hospice benefit as a result of the changes presented in this proposed rule using data for 3,440 hospices in our database.

TABLE 2—ACCOUNTING STATEMENT: CLASSIFICATION OF ESTIMATED EXPENDITURES, FROM FY 2011 TO FY 2012

[In $millions]

Category	Transfers
Annualized Monetized Transfers.	$ −80. *

TABLE 2—ACCOUNTING STATEMENT: CLASSIFICATION OF ESTIMATED EXPENDITURES, FROM FY 2011 TO FY 2012—Continued

[In $millions]

Category	Transfers
From Whom to Whom ..	Federal Government to Hospices.

*The $80 million reduction in transfers includes the additional 15 percent reduction in the BNAF and the updated wage data. It does not include the hospital market basket update, which is estimated at 2.8 percent for FY 2012. This estimated 2.8 percent does not reflect the provision in the Affordable Care Act (ACA) which reduced the hospital market basket update by 0.1 percentage point since that reduction does not apply to hospices.

i. Conclusion

In conclusion, the overall effect of this proposed rule is estimated to be the $80 million reduction in Federal payments due to the wage index changes (including the additional 15 percent reduction in the BNAF). Furthermore, the Secretary has determined that this will not have a significant impact on a substantial number of small entities, or have a significant effect relative to section 1102(b) of the Act.

B. Regulatory Flexibility Act Analysis

The RFA requires agencies to analyze options for regulatory relief of small businesses if a rule has a significant impact on a substantial number of small entities. For purposes of the RFA, we estimate that almost all hospices are small entities as that term is used in the RFA. The great majority of hospitals and most other health care providers and suppliers are small entities, either by being nonprofit organizations or by meeting the Small Business Administration (SBA) definition of a small business (having revenues of less than $7.0 million to $34.5 million in any 1 year). While the SBA does not define a size threshold in terms of annual revenues for hospices, it does define one for home health agencies ($13.5 million; see*http://ecfr.gpoaccess.gov/cgi/t/text/text-idx?c=ecfr&sid=2465b064ba6965cc1fbd2eae60854b11&rgn=div8&view=text&node=13:1.0.1.1.16.1.266.9&idno=13*). For the purposes of this proposed rule, because the hospice benefit is a home-based benefit, we are applying the SBA definition of "small" for home health agencies to hospices; we will use this definition of "small" in determining if this proposed rule has a significant impact on a substantial number of small entities (for example, hospices). Using 2009 Medicare hospice claims data, we estimate that 96 percent of hospices have Medicare revenues below $13.5 million and are considered small entities. As indicated in Table 1 below, there are 3,440 hospices with 2009 claims data as of January 6, 2011. Approximately 48 percent of those 3,440 Medicare certified hospices are identified as voluntary or government agencies and, therefore, are considered small entities. Most of these and most of the remainder are also small hospice entities because, as noted above, their revenues fall below the SBA size thresholds.

The effects of this rule on hospices are shown in Table 1. Overall, Medicare payments to all hospices would decrease by an estimated 0.5 percent over last year's payments in response to the policies that we are proposing in this NPRM, reflecting the combined effects of the updated wage data and the additional 15 percent reduction in the BNAF. The combined effects of the updated wage data and additional 15 percent reduction in the BNAF on small or medium sized hospices (as defined by routine home care days rather than by the SBA definition), is −0.6 percent. However, when including the estimated inpatient hospital market basket update of 2.8 percent into these estimates, the combined effects on Medicare payment to all hospices would result in an estimated increase of approximately 2.3 percent. For small and medium hospices (as defined by routine home care days), the estimated effects on revenue when accounting for the updated wage data, the additional 15 percent BNAF reduction, and the estimated inpatient hospital market basket update are increases in payments of 2.2 percent. Overall average hospice revenue effects will be slightly less than these estimates since according the National Hospice and Palliative Care Organization, about 17 percent of hospice patients are non-Medicare.

HHS's practice in interpreting the RFA is to consider effects economically "significant" only if they reach a threshold of 3 to 5 percent or more of total revenue or total costs. As noted above, the combined effect of only the updated wage data and the additional 15 percent reduced BNAF (for a total BNAF reduction of 40 percent) for all hospices is −0.5 percent. Since, by SBA's definition of "small" (when applied to hospices), nearly all hospices are considered to be small entities, the combined effect of only the updated wage data and the additional 15 percent reduced BNAF (−0.5 percent) does not exceed HHS's 3.0 percent minimum threshold. However, HHS's practice in determining "significant economic impact" has considered either total revenue or total costs. Total hospice revenues include the effect of the market basket update. When we consider the combined effect of the updated wage data, the additional 15 percent BNAF reduction, and the estimated 2.8 percent FY 2012 inpatient hospital market basket update, the overall impact is an increase in estimated hospice payments of 2.3 percent for FY 2012. Therefore, the Secretary has determined that this proposed rule would not create a significant economic impact on a substantial number of small entities.

In addition, section 1102(b) of the Act requires us to prepare a regulatory impact analysis if a rule may have a significant impact on the operations of a substantial number of small rural hospitals. This analysis must conform to the provisions of section 604 of the RFA. For purposes of section 1102(b) of the Act, we define a small rural hospital as a hospital that is located outside of a metropolitan statistical area and has fewer than 100 beds. This proposed rule only affects hospices. Therefore, the Secretary has determined that this proposed rule would not have a significant impact on the operations of a substantial number of small rural hospitals.

C. Unfunded Mandates Reform Act Analysis

Section 202 of the Unfunded Mandates Reform Act of 1995 (UMRA) also requires that agencies assess anticipated costs and benefits before issuing any rule whose mandates require spending in any 1 year of $100 million in 1995 dollars, updated annually for inflation. In 2011, that threshold is approximately $136 million. This proposed rule with comment period is not anticipated to have an effect on State, local, or tribal governments, in the aggregate, or on the private sector of $136 million or more.

VIII. Federalism Analysis

Executive Order 13132 establishes certain requirements that an agency must meet when it promulgates a proposed rule (and subsequent final rule) that imposes substantial direct requirement costs on State and local governments, preempts State law, or otherwise has Federalism implications. We have reviewed this proposed rule under the threshold criteria of Executive Order 13132, Federalism, and have determined that it would not have an impact on the rights, roles, and responsibilities of State, local, or tribal governments.

List of Subjects in 42 CFR Part 418

Health facilities, Hospice care, Medicare, Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, the Centers for Medicare & Medicaid Services proposes to amend 42 CFR chapter IV as set forth below:

1. The authority citation for part 418 continues to read as follows:

Authority: Secs 1102 and 1871 of the Social Security Act (42 U.S.C. 1302 and 1395hh).

Subpart G—Payment for Hospice Care

2. In § 418.22, paragraphs (a)(4) and (b)(4) are revised to read as follows:

§ 418.22 Certification of terminal illness.

(a) * * *

(4) *Face-to-face encounter.* As of January 1, 2011, a hospice physician or hospice nurse practitioner must have a face-to-face encounter with each hospice patient whose total stay across all hospices is anticipated to reach the 3rd benefit period. The face-to-face encounter must occur prior to but no more than 30 calendar days prior to the 3rd benefit period recertification, and every benefit period recertification thereafter, to gather clinical findings to determine continued eligibility for hospice care.

(b) * * *

(4) The physician or nurse practitioner who performs the face-to-face encounter with the patient described in paragraph (a)(4) of this section must attest in writing that he or she had a face-to-face encounter with the patient, including the date of that visit. The attestation of the nurse practitioner or a non-certifying hospice physician shall state that the clinical findings of that visit were provided to the certifying physician for use in determining continued eligibility for hospice care.

* * * * *

3. Section 418.202 (g) is revised to read:

§ 418.202 Covered services.

* * * * *

(g) *Home health or hospice aide services furnished by qualified aides as designated in § 418.76 and homemaker services.* Home health aides (also known as hospice aides) may provide personal care services as defined in § 409.45(b) of this chapter. Aides may perform household services to maintain a safe and sanitary environment in areas of the home used by the patient, such as changing bed linens or light cleaning and laundering essential to the comfort and cleanliness of the patient. Aide services must be provided under the general supervision of a registered nurse. Homemaker services may include assistance in maintenance of a safe and healthy environment and services to enable the individual to carry out the treatment plan.

* * * * *

4. In § 418.309, the introductory text and paragraph (b) are revised, and new paragraphs (c) and (d) are added, to read:

§ 418.309 Hospice Aggregate Cap.

A hospice's aggregate cap is calculated by multiplying the adjusted cap amount (determined in paragraph (a) of this section) by the number of Medicare beneficiaries, as determined by one of two methodologies for determining the number of Medicare beneficiaries for a given cap year described in paragraphs (b) and (c) of this section:

* * * * *

(b) *Streamlined Methodology Defined.* A hospice's aggregate cap is calculated by multiplying the adjusted cap amount determined in paragraph (a) of this section by the number of Medicare beneficiaries as determined in paragraphs (b)(1) and (2) of this section. For purposes of the streamlined methodology calculation—

(1) In the case in which a beneficiary received care from only one hospice, the hospice includes in its number of Medicare beneficiaries those Medicare beneficiaries who have not previously been included in the calculation of any hospice cap, and who have filed an election to receive hospice care in accordance with § 418.24 during the period beginning on September 28 (34 days before the beginning of the cap year) and ending on September 27 (35 days before the end of the cap year), using the best data available at the time of the calculation.

(2) In the case in which a beneficiary received care from more than one hospice, each hospice includes in its number of Medicare beneficiaries only that fraction which represents the portion of a patient's total days of care in all hospices and all years that was spent in that hospice in that cap year, using the best data available at the time of the calculation. The aggregate cap calculation for a given cap year may be adjusted after the calculation for that year based on updated data.

(c) *Patient-by-Patient Proportional Methodology Defined.* A hospice's aggregate cap is calculated by multiplying the adjusted cap amount determined in paragraph (a) of this section by the number of Medicare beneficiaries as described in paragraphs (c)(1) and (2) of this section. For the purposes of the patient-by-patient proportional methodology—

(1) A hospice includes in its number of Medicare beneficiaries only that fraction which represents the portion of a patient's total days of care in all hospices and all years that was spent in that hospice in that cap year, using the best data available at the time of the calculation. The total number of Medicare beneficiaries for a given hospice's cap year is determined by summing the whole or fractional share of each Medicare beneficiary that received hospice care during the cap year, from that hospice.

(2) The aggregate cap calculation for a given cap year may be adjusted after the calculation for that year based on updated data.

(d) *Application of Methodologies.* (1) For cap years ending October 31, 2011 and for prior cap years, a hospice's aggregate cap is calculated using the streamlined methodology described in paragraph (b) of this section, subject to the following:

(i) A hospice that has not received a cap determination for a cap year ending on or before October 31, 2011 as of October 1, 2011, may elect to have its final cap determination for such cap years calculated using the patient-by-patient proportional methodology described in paragraph (c) of this section; or

(ii) A hospice that has filed a timely appeal regarding the methodology used for determining the number of Medicare beneficiaries in its cap calculation for any cap year is deemed to have elected that its cap determination for the challenged year, and all subsequent cap years, be calculated using the patient-by-patient proportional methodology described in paragraph (c) of this section.

(2) For cap years ending October 31, 2012, and all subsequent cap years, a hospice's aggregate cap is calculated using the patient-by-patient proportional methodology described in paragraph (c) of this section, subject to the following:

(i) A hospice that has had its cap calculated using the patient-by-patient proportional methodology for any cap year(s) prior to the 2012 cap year is not eligible to elect the streamlined methodology, and must continue to have the patient-by-patient proportional methodology used to determine the number of Medicare beneficiaries in a given cap year.

(ii) A hospice that is eligible to make a one-time election to have its cap calculated using the streamlined

methodology must make that election no later than 60 days after receipt of its 2012 cap determination. A hospice's election to have its cap calculated using the streamlined methodology would remain in effect unless:

(A) The hospice subsequently submits a written election to change the methodology used in its cap determination to the patient-by-patient proportional methodology; or

(B) The hospice appeals the streamlined methodology used to determine the number of Medicare beneficiaries used in the aggregate cap calculation.

(3) If a hospice that elected to have its aggregate cap calculated using the streamlined methodology under paragraph (d)(2)(ii) of this section subsequently elects the patient-by-patient proportional methodology or appeals the streamlined methodology, under paragraph (d)(2)(ii)(A) or (B) of this section, the hospice's aggregate cap determination for that cap year and all subsequent cap years is to be calculated using the patient-by-patient proportional methodology. As such, past cap year determinations may be adjusted to prevent the over-counting of beneficiaries, notwithstanding the ordinary limitations on reopening.

(Catalog of Federal Domestic Assistance Program No. 93.773, Medicare—Hospital Insurance; and Program No. 93.774, Medicare—Supplementary Medical Insurance Program)

Dated: April 14, 2011.

Donald M. Berwick,

Administrator, Centers for Medicare & Medicaid Services.

Approved: April 19, 2011.

Kathleen Sebelius,

Secretary.

Note: The following Addendums will not be published in the Code of Federal Regulations.

BILLING CODE 4120–01–P

ADDENDUM A: FY 2012 WAGE INDEX FOR URBAN AREAS

CBSA Code	Urban Area[1] (Constituent Counties)	Wage Index[2]
10180	Abilene, TX Callahan County, TX Jones County, TX Taylor County, TX	0.8287
10380	Aguadilla-Isabela-San Sebastián, PR Aguada Municipio, PR Aguadilla Municipio, PR Añasco Municipio, PR Isabela Municipio, PR Lares Municipio, PR Moca Municipio, PR Rincón Municipio, PR San Sebastián Municipio, PR	0.3992
10420	Akron, OH Portage County, OH Summit County, OH	0.9156
10500	Albany, GA Baker County, GA Dougherty County, GA Lee County, GA Terrell County, GA Worth County, GA	0.9356
10580	Albany-Schenectady-Troy, NY Albany County, NY Rensselaer County, NY Saratoga County, NY Schenectady County, NY Schoharie County, NY	0.8960
10740	Albuquerque, NM Bernalillo County, NM Sandoval County, NM Torrance County, NM Valencia County, NM	0.9791
10780	Alexandria, LA Grant Parish, LA Rapides Parish, LA	0.8278
10900	Allentown-Bethlehem-Easton, PA-NJ Warren County, NJ Carbon County, PA Lehigh County, PA Northampton County, PA	0.9520
11020	Altoona, PA Blair County, PA	0.8925
11100	Amarillo, TX Armstrong County, TX Carson County, TX Potter County, TX Randall County, TX	0.8950
11180	Ames, IA Story County, IA	1.0323
11260	Anchorage, AK Anchorage Municipality, AK Matanuska-Susitna Borough, AK	1.2388
11300	Anderson, IN Madison County, IN	0.9518
11340	Anderson, SC Anderson County, SC	0.8999
11460	Ann Arbor, MI Washtenaw County, MI	1.0483
11500	Anniston-Oxford, AL Calhoun County, AL	0.8199

11540	Appleton, WI Calumet County, WI Outagamie County, WI	0.9693
11700	Asheville, NC Buncombe County, NC Haywood County, NC Henderson County, NC Madison County, NC	0.9320
12020	Athens-Clarke County, GA Clarke County, GA Madison County, GA Oconee County, GA Oglethorpe County, GA	1.0001
12060	Atlanta-Sandy Springs-Marietta, GA Barrow County, GA Bartow County, GA Butts County, GA Carroll County, GA Cherokee County, GA Clayton County, GA Cobb County, GA Coweta County, GA Dawson County, GA DeKalb County, GA Douglas County, GA Fayette County, GA Forsyth County, GA Fulton County, GA Gwinnett County, GA Haralson County, GA Heard County, GA Henry County, GA Jasper County, GA Lamar County, GA Meriwether County, GA Newton County, GA Paulding County, GA Pickens County, GA Pike County, GA Rockdale County, GA Spalding County, GA Walton County, GA	0.9887
12100	Atlantic City-Hammonton, NJ Atlantic County, NJ	1.1523
12220	Auburn-Opelika, AL Lee County, AL	0.8000
12260	Augusta-Richmond County, GA-SC Burke County, GA Columbia County, GA McDuffie County, GA Richmond County, GA Aiken County, SC Edgefield County, SC	0.9876
12420	Austin-Round Rock-San Marcos, TX Bastrop County, TX Caldwell County, TX Hays County, TX Travis County, TX Williamson County, TX	0.9851
12540	Bakersfield-Delano, CA Kern County, CA	1.2122
12580	Baltimore-Towson, MD Anne Arundel County, MD Baltimore County, MD Carroll County, MD Harford County, MD Howard County, MD Queen Anne's County, MD Baltimore City, MD	1.0618
12620	Bangor, ME Penobscot County, ME	1.0123
12700	Barnstable Town, MA Barnstable County, MA	1.3277
12940	Baton Rouge, LA Ascension Parish, LA East Baton Rouge Parish, LA East Feliciana Parish, LA Iberville Parish, LA Livingston Parish, LA Pointe Coupee Parish, LA St. Helena Parish, LA West Baton Rouge Parish, LA West Feliciana Parish, LA	0.8887
12980	Battle Creek, MI Calhoun County, MI	0.9998
13020	Bay City, MI Bay County, MI	0.9548
13140	Beaumont-Port Arthur, TX Hardin County, TX Jefferson County, TX Orange County, TX	0.8789

13380	Bellingham, WA Whatcom County, WA	1.1794
13460	Bend, OR Deschutes County, OR	1.1775
13644	Bethesda-Rockville-Frederick, MD Frederick County, MD Montgomery County, MD	1.0898
13740	Billings, MT Carbon County, MT Yellowstone County, MT	0.8981
13780	Binghamton, NY Broome County, NY Tioga County, NY	0.9028
13820	Birmingham-Hoover, AL Bibb County, AL Blount County, AL Chilton County, AL Jefferson County, AL St. Clair County, AL Shelby County, AL Walker County, AL	0.8916
13900	Bismarck, ND Burleigh County, ND Morton County, ND	0.8000
13980	Blacksburg-Christiansburg-Radford, VA Giles County, VA Montgomery County, VA Pulaski County, VA Radford City, VA	0.8609
14020	Bloomington, IN Greene County, IN Monroe County, IN Owen County, IN	0.9308
14060	Bloomington-Normal, IL McLean County, IL	0.9773
14260	Boise City-Nampa, ID Ada County, ID Boise County, ID Canyon County, ID Gem County, ID Owyhee County, ID	0.9602
14484	Boston-Quincy, MA Norfolk County, MA Plymouth County, MA Suffolk County, MA	1.2610
14500	Boulder, CO Boulder County, CO	1.0422
14540	Bowling Green, KY Edmonson County, KY Warren County, KY	0.8973
14740	Bremerton-Silverdale, WA Kitsap County, WA	1.1045
14860	Bridgeport-Stamford-Norwalk, CT Fairfield County, CT	1.2992
15180	Brownsville-Harlingen, TX Cameron County, TX	0.9498
15260	Brunswick, GA Brantley County, GA Glynn County, GA McIntosh County, GA	0.9535
15380	Buffalo-Niagara Falls, NY Erie County, NY Niagara County, NY	0.9868
15500	Burlington, NC Alamance County, NC	0.9177
15540	Burlington-South Burlington, VT Chittenden County, VT Franklin County, VT Grand Isle County, VT	1.0299
15764	Cambridge-Newton-Framingham, MA Middlesex County, MA	1.1649
15804	Camden, NJ Burlington County, NJ Camden County, NJ Gloucester County, NJ	1.0754
15940	Canton-Massillon, OH Carroll County, OH Stark County, OH	0.9059
15980	Cape Coral-Fort Myers, FL Lee County, FL	0.9521
16020	Cape Girardeau-Jackson, MO-IL Alexander County, IL Bollinger County, MO Cape Girardeau County, MO	0.9301
16180	Carson City, NV Carson City, NV	1.0836
16220	Casper, WY Natrona County, WY	0.9997

16300	Cedar Rapids, IA Benton County, IA Jones County, IA Linn County, IA	0.9157
16580	Champaign-Urbana, IL Champaign County, IL Ford County, IL Piatt County, IL	1.0598
16620	Charleston, WV Boone County, WV Clay County, WV Kanawha County, WV Lincoln County, WV Putnam County, WV	0.8175
16700	Charleston-North Charleston-Summerville, SC Berkeley County, SC Charleston County, SC Dorchester County, SC	0.9685
16740	Charlotte-Gastonia-Rock Hill, NC-SC Anson County, NC Cabarrus County, NC Gaston County, NC Mecklenburg County, NC Union County, NC York County, SC	0.9754
16820	Charlottesville, VA Albemarle County, VA Fluvanna County, VA Greene County, VA Nelson County, VA Charlottesville City, VA	0.9673
16860	Chattanooga, TN-GA Catoosa County, GA Dade County, GA Walker County, GA Hamilton County, TN Marion County, TN Sequatchie County, TN	0.9142
16940	Cheyenne, WY Laramie County, WY	0.9725
16974	Chicago-Joliet-Naperville, IL Cook County, IL DeKalb County, IL DuPage County, IL Grundy County, IL Kane County, IL Kendall County, IL McHenry County, IL Will County, IL	1.0968
17020	Chico, CA Butte County, CA	1.1942
17140	Cincinnati-Middletown, OH-KY-IN Dearborn County, IN Franklin County, IN Ohio County, IN Boone County, KY Bracken County, KY Campbell County, KY Gallatin County, KY Grant County, KY Kenton County, KY Pendleton County, KY Brown County, OH Butler County, OH Clermont County, OH Hamilton County, OH Warren County, OH	1.0043
17300	Clarksville, TN-KY Christian County, KY Trigg County, KY Montgomery County, TN Stewart County, TN	0.8168
17420	Cleveland, TN Bradley County, TN Polk County, TN	0.8005
17460	Cleveland-Elyria-Mentor, OH Cuyahoga County, OH Geauga County, OH Lake County, OH Lorain County, OH Medina County, OH	0.9371
17660	Coeur d'Alene, ID Kootenai County, ID	0.9696

17780	College Station-Bryan, TX Brazos County, TX Burleson County, TX Robertson County, TX	0.9928
17820	Colorado Springs, CO El Paso County, CO Teller County, CO	0.9817
17860	Columbia, MO Boone County, MO Howard County, MO	0.8575
17900	Columbia, SC Calhoun County, SC Fairfield County, SC Kershaw County, SC Lexington County, SC Richland County, SC Saluda County, SC	0.9042
17980	Columbus, GA-AL Russell County, AL Chattahoochee County, GA Harris County, GA Marion County, GA Muscogee County, GA	0.9347
18020	Columbus, IN Bartholomew County, IN	0.9768
18140	Columbus, OH Delaware County, OH Fairfield County, OH Franklin County, OH Licking County, OH Madison County, OH Morrow County, OH Pickaway County, OH Union County, OH	1.0500
18580	Corpus Christi, TX Aransas County, TX Nueces County, TX San Patricio County, TX	0.8889
18700	Corvallis, OR Benton County, OR	1.0825
18880	Crestview-Fort Walton Beach-Destin, FL Okaloosa County, FL	0.9155
19060	Cumberland, MD-WV Allegany County, MD Mineral County, WV	0.8476
19124	Dallas-Plano-Irving, TX Collin County, TX Dallas County, TX Delta County, TX Denton County, TX Ellis County, TX Hunt County, TX Kaufman County, TX Rockwall County, TX	1.0209
19140	Dalton, GA Murray County, GA Whitfield County, GA	0.8928
19180	Danville, IL Vermilion County, IL	1.0036
19260	Danville, VA Pittsylvania County, VA Danville City, VA	0.8457
19340	Davenport-Moline-Rock Island, IA-IL Henry County, IL Mercer County, IL Rock Island County, IL Scott County, IA	0.8698
19380	Dayton, OH Greene County, OH Miami County, OH Montgomery County, OH Preble County, OH	0.9464
19460	Decatur, AL Lawrence County, AL Morgan County, AL	0.8000
19500	Decatur, IL Macon County, IL	0.8197
19660	Deltona-Daytona Beach-Ormond Beach, FL Volusia County, FL	0.9046
19740	Denver-Aurora-Broomfield, CO Adams County, CO Arapahoe County, CO Broomfield County, CO Clear Creek County, CO Denver County, CO Douglas County, CO Elbert County, CO Gilpin County, CO Jefferson County, CO Park County, CO	1.1098

19780	Des Moines-West Des Moines, IA Dallas County, IA Guthrie County, IA Madison County, IA Polk County, IA Warren County, IA	0.9962
19804	Detroit-Livonia-Dearborn, MI Wayne County, MI	1.0043
20020	Dothan, AL Geneva County, AL Henry County, AL Houston County, AL	0.8000
20100	Dover, DE Kent County, DE	1.0273
20220	Dubuque, IA Dubuque County, IA	0.9085
20260	Duluth, MN-WI Carlton County, MN St. Louis County, MN Douglas County, WI	1.0939
20500	Durham-Chapel Hill, NC Chatham County, NC Durham County, NC Orange County, NC Person County, NC	1.0006
20740	Eau Claire, WI Chippewa County, WI Eau Claire County, WI	0.9981
20764	Edison-New Brunswick, NJ Middlesex County, NJ Monmouth County, NJ Ocean County, NJ Somerset County, NJ	1.1396
20940	El Centro, CA Imperial County, CA	0.9586
21060	Elizabethtown, KY Hardin County, KY Larue County, KY	0.8748
21140	Elkhart-Goshen, IN Elkhart County, IN	0.9800
21300	Elmira, NY Chemung County, NY	0.8744
21340	El Paso, TX El Paso County, TX	0.8775
21500	Erie, PA Erie County, PA	0.8656
21660	Eugene-Springfield, OR Lane County, OR	1.1787
21780	Evansville, IN-KY Gibson County, IN Posey County, IN Vanderburgh County, IN Warrick County, IN Henderson County, KY Webster County, KY	0.8732
21820	Fairbanks, AK Fairbanks North Star Borough, AK	1.1473
21940	Fajardo, PR Ceiba Municipio, PR Fajardo Municipio, PR Luquillo Municipio, PR	0.4465
22020	Fargo, ND-MN Cass County, ND Clay County, MN	0.8350
22140	Farmington, NM San Juan County, NM	0.9670
22180	Fayetteville, NC Cumberland County, NC Hoke County, NC	0.9653
22220	Fayetteville-Springdale-Rogers, AR-MO Benton County, AR Madison County, AR Washington County, AR McDonald County, MO	0.8921
22380	Flagstaff, AZ Coconino County, AZ	1.2884
22420	Flint, MI Genesee County, MI	1.1903
22500	Florence, SC Darlington County, SC Florence County, SC	0.8544
22520	Florence-Muscle Shoals, AL Colbert County, AL Lauderdale County, AL	0.8433
22540	Fond du Lac, WI Fond du Lac County, WI	0.9550
22660	Fort Collins-Loveland, CO Larimer County, CO	1.0243
22744	Fort Lauderdale-Pompano Beach-Deerfield Beach, FL Broward County, FL	1.0520

22900	Fort Smith, AR-OK Crawford County, AR Franklin County, AR Sebastian County, AR Le Flore County, OK Sequoyah County, OK	0.8000
23060	Fort Wayne, IN Allen County, IN Wells County, IN Whitley County, IN	0.9694
23104	Fort Worth-Arlington, TX Johnson County, TX Parker County, TX Tarrant County, TX Wise County, TX	0.9810
23420	Fresno, CA Fresno County, CA	1.1827
23460	Gadsden, AL Etowah County, AL	0.8000
23540	Gainesville, FL Alachua County, FL Gilchrist County, FL	0.9485
23580	Gainesville, GA Hall County, GA	0.9550
23844	Gary, IN Jasper County, IN Lake County, IN Newton County, IN Porter County, IN	0.9406
24020	Glens Falls, NY Warren County, NY Washington County, NY	0.8808
24140	Goldsboro, NC Wayne County, NC	0.9388
24220	Grand Forks, ND-MN Polk County, MN Grand Forks County, ND	0.8000
24300	Grand Junction, CO Mesa County, CO	1.0199
24340	Grand Rapids-Wyoming, MI Barry County, MI Ionia County, MI Kent County, MI Newaygo County, MI	0.9494
24500	Great Falls, MT Cascade County, MT	0.8583
24540	Greeley, CO Weld County, CO	0.9833
24580	Green Bay, WI Brown County, WI Kewaunee County, WI Oconto County, WI	0.9926
24660	Greensboro-High Point, NC Guilford County, NC Randolph County, NC Rockingham County, NC	0.9197
24780	Greenville, NC Greene County, NC Pitt County, NC	0.9702
24860	Greenville-Mauldin-Easley, SC Greenville County, SC Laurens County, SC Pickens County, SC	0.9986
25020	Guayama, PR Arroyo Municipio, PR Guayama Municipio, PR Patillas Municipio, PR	0.4239
25060	Gulfport-Biloxi, MS Hancock County, MS Harrison County, MS Stone County, MS	0.9192
25180	Hagerstown-Martinsburg, MD-WV Washington County, MD Berkeley County, WV Morgan County, WV	0.9582
25260	Hanford-Corcoran, CA Kings County, CA	1.1602
25420	Harrisburg-Carlisle, PA Cumberland County, PA Dauphin County, PA Perry County, PA	0.9625
25500	Harrisonburg, VA Rockingham County, VA Harrisonburg City, VA	0.9483
25540	Hartford-West Hartford-East Hartford, CT Hartford County, CT Middlesex County, CT Tolland County, CT	1.1314
25620	Hattiesburg, MS Forrest County, MS Lamar County, MS Perry County, MS	0.8000

25860	Hickory-Lenoir-Morganton, NC Alexander County, NC Burke County, NC Caldwell County, NC Catawba County, NC	0.9001
25980	Hinesville-Fort Stewart, GA[3] Liberty County, GA Long County, GA	0.9275
26100	Holland-Grand Haven, MI Ottawa County, MI	0.8938
26180	Honolulu, HI Honolulu County, HI	1.2225
26300	Hot Springs, AR Garland County, AR	0.9475
26380	Houma-Bayou Cane-Thibodaux, LA Lafourche Parish, LA Terrebonne Parish, LA	0.8130
26420	Houston-Sugar Land-Baytown, TX Austin County, TX Brazoria County, TX Chambers County, TX Fort Bend County, TX Galveston County, TX Harris County, TX Liberty County, TX Montgomery County, TX San Jacinto County, TX Waller County, TX	1.0172
26580	Huntington-Ashland, WV-KY-OH Boyd County, KY Greenup County, KY Lawrence County, OH Cabell County, WV Wayne County, WV	0.9270
26620	Huntsville, AL Limestone County, AL Madison County, AL	0.9517
26820	Idaho Falls, ID Bonneville County, ID Jefferson County, ID	1.0005
26900	Indianapolis-Carmel, IN Boone County, IN Brown County, IN Hamilton County, IN Hancock County, IN Hendricks County, IN Johnson County, IN Marion County, IN Morgan County, IN Putnam County, IN Shelby County, IN	1.0015
26980	Iowa City, IA Johnson County, IA Washington County, IA	0.9999
27060	Ithaca, NY Tompkins County, NY	1.0191
27100	Jackson, MI Jackson County, MI	0.9479
27140	Jackson, MS Copiah County, MS Hinds County, MS Madison County, MS Rankin County, MS Simpson County, MS	0.8327
27180	Jackson, TN Chester County, TN Madison County, TN	0.8702
27260	Jacksonville, FL Baker County, FL Clay County, FL Duval County, FL Nassau County, FL St. Johns County, FL	0.9199
27340	Jacksonville, NC Onslow County, NC	0.8084
27500	Janesville, WI Rock County, WI	0.9749
27620	Jefferson City, MO Callaway County, MO Cole County, MO Moniteau County, MO Osage County, MO	0.8733
27740	Johnson City, TN Carter County, TN Unicoi County, TN Washington County, TN	0.8392

27780	Johnstown, PA Cambria County, PA	0.8377
27860	Jonesboro, AR Craighead County, AR Poinsett County, AR	0.8032
27900	Joplin, MO Jasper County, MO Newton County, MO	0.8505
28020	Kalamazoo-Portage, MI Kalamazoo County, MI Van Buren County, MI	1.0657
28100	Kankakee-Bradley, IL Kankakee County, IL	1.0995
28140	Kansas City, MO-KS Franklin County, KS Johnson County, KS Leavenworth County, KS Linn County, KS Miami County, KS Wyandotte County, KS Bates County, MO Caldwell County, MO Cass County, MO Clay County, MO Clinton County, MO Jackson County, MO Lafayette County, MO Platte County, MO Ray County, MO	0.9994
28420	Kennewick-Pasco-Richland, WA Benton County, WA Franklin County, WA	1.0330
28660	Killeen-Temple-Fort Hood, TX Bell County, TX Coryell County, TX Lampasas County, TX	0.9110
28700	Kingsport-Bristol-Bristol, TN-VA Hawkins County, TN Sullivan County, TN Bristol City, VA Scott County, VA Washington County, VA	0.8000
28740	Kingston, NY Ulster County, NY	0.9397
28940	Knoxville, TN Anderson County, TN Blount County, TN Knox County, TN Loudon County, TN Union County, TN	0.8120
29020	Kokomo, IN Howard County, IN Tipton County, IN	0.9454
29100	La Crosse, WI-MN Houston County, MN La Crosse County, WI	1.0150
29140	Lafayette, IN Benton County, IN Carroll County, IN Tippecanoe County, IN	0.9618
29180	Lafayette, LA Lafayette Parish, LA St. Martin Parish, LA	0.8790
29340	Lake Charles, LA Calcasieu Parish, LA Cameron Parish, LA	0.8486
29404	Lake County-Kenosha County, IL-WI Lake County, IL Kenosha County, WI	1.1163
29420	Lake Havasu City - Kingman, AZ Mohave County, AZ	1.0598
29460	Lakeland-Winter Haven, FL Polk County, FL	0.8746
29540	Lancaster, PA Lancaster County, PA	0.9675
29620	Lansing-East Lansing, MI Clinton County, MI Eaton County, MI Ingham County, MI	1.0663
29700	Laredo, TX Webb County, TX	0.8194
29740	Las Cruces, NM Dona Ana County, NM	0.9625
29820	Las Vegas-Paradise, NV Clark County, NV	1.2528
29940	Lawrence, KS Douglas County, KS	0.8835
30020	Lawton, OK Comanche County, OK	0.8579

30140	Lebanon, PA Lebanon County, PA	0.8084
30300	Lewiston, ID-WA Nez Perce County, ID Asotin County, WA	0.9690
30340	Lewiston-Auburn, ME Androscoggin County, ME	0.9218
30460	Lexington-Fayette, KY Bourbon County, KY Clark County, KY Fayette County, KY Jessamine County, KY Scott County, KY Woodford County, KY	0.9129
30620	Lima, OH Allen County, OH	0.9600
30700	Lincoln, NE Lancaster County, NE Seward County, NE	0.9958
30780	Little Rock-North Little Rock-Conway AR Faulkner County, AR Grant County, AR Lonoke County, AR Perry County, AR Pulaski County, AR Saline County, AR	0.8849
30860	Logan, UT-ID Franklin County, ID Cache County, UT	0.9106
30980	Longview, TX Gregg County, TX Rusk County, TX Upshur County, TX	0.8866
31020	Longview, WA Cowlitz County, WA	1.0661
31084	Los Angeles-Long Beach-Glendale, CA Los Angeles County, CA	1.2560
31140	Louisville-Jefferson County, KY-IN Clark County, IN Floyd County, IN Harrison County, IN Washington County, IN Bullitt County, KY Henry County, KY Jefferson County, KY Meade County, KY Nelson County, KY Oldham County, KY Shelby County, KY Spencer County, KY Trimble County, KY	0.9211
31180	Lubbock, TX Crosby County, TX Lubbock County, TX	0.9161
31340	Lynchburg, VA Amherst County, VA Appomattox County, VA Bedford County, VA Campbell County, VA Bedford City, VA Lynchburg City, VA	0.9002
31420	Macon, GA Bibb County, GA Crawford County, GA Jones County, GA Monroe County, GA Twiggs County, GA	0.9528
31460	Madera-Chowchilla, CA Madera County, CA	0.8269
31540	Madison, WI Columbia County, WI Dane County, WI Iowa County, WI	1.1694
31700	Manchester-Nashua, NH Hillsborough County, NH	1.0219
31740	Manhattan, KS Geary County, KS Pottawatomie County, KS Riley County, KS	0.8125
31860	Mankato-North Mankato, MN Blue Earth County, MN Nicollet County, MN	0.9405

31900	Mansfield, OH Richland County, OH	0.9234
32420	Mayagüez, PR Hormigueros Municipio, PR Mayagüez Municipio, PR	0.4186
32580	McAllen-Edinburg-Mission, TX Hidalgo County, TX	0.9150
32780	Medford, OR Jackson County, OR	1.0418
32820	Memphis, TN-MS-AR Crittenden County, AR DeSoto County, MS Marshall County, MS Tate County, MS Tunica County, MS Fayette County, TN Shelby County, TN Tipton County, TN	0.9596
32900	Merced, CA Merced County, CA	1.2797
33124	Miami-Miami Beach-Kendall, FL Miami-Dade County, FL	1.0487
33140	Michigan City-La Porte, IN LaPorte County, IN	0.9806
33260	Midland, TX Midland County, TX	1.0055
33340	Milwaukee-Waukesha-West Allis, WI Milwaukee County, WI Ozaukee County, WI Washington County, WI Waukesha County, WI	1.0544
33460	Minneapolis-St. Paul-Bloomington, MN-WI Anoka County, MN Carver County, MN Chisago County, MN Dakota County, MN Hennepin County, MN Isanti County, MN Ramsey County, MN Scott County, MN Sherburne County, MN Washington County, MN Wright County, MN Pierce County, WI St. Croix County, WI	1.1538
33540	Missoula, MT Missoula County, MT	0.9237
33660	Mobile, AL Mobile County, AL	0.8242
33700	Modesto, CA Stanislaus County, CA	1.2533
33740	Monroe, LA Ouachita Parish, LA Union Parish, LA	0.8276
33780	Monroe, MI Monroe County, MI	0.8992
33860	Montgomery, AL Autauga County, AL Elmore County, AL Lowndes County, AL Montgomery County, AL	0.8741
34060	Morgantown, WV Monongalia County, WV Preston County, WV	0.8425
34100	Morristown, TN Grainger County, TN Hamblen County, TN Jefferson County, TN	0.8000
34580	Mount Vernon-Anacortes, WA Skagit County, WA	1.0730
34620	Muncie, IN Delaware County, IN	0.8497
34740	Muskegon-Norton Shores, MI Muskegon County, MI	1.0157
34820	Myrtle Beach-North Myrtle Beach-Conway, SC Horry County, SC	0.9048
34900	Napa, CA Napa County, CA	1.5122
34940	Naples-Marco Island, FL Collier County, FL	1.0042

34980	Nashville-Davidson--Murfreesboro-Franklin, TN Cannon County, TN Cheatham County, TN Davidson County, TN Dickson County, TN Hickman County, TN Macon County, TN Robertson County, TN Rutherford County, TN Smith County, TN Sumner County, TN Trousdale County, TN Williamson County, TN Wilson County, TN	0.9792
35004	Nassau-Suffolk, NY Nassau County, NY Suffolk County, NY	1.2751
35084	Newark-Union, NJ-PA Essex County, NJ Hunterdon County, NJ Morris County, NJ Sussex County, NJ Union County, NJ Pike County, PA	1.1866
35300	New Haven-Milford, CT New Haven County, CT	1.1923
35380	New Orleans-Metairie-Kenner, LA Jefferson Parish, LA Orleans Parish, LA Plaquemines Parish, LA St. Bernard Parish, LA St. Charles Parish, LA St. John the Baptist Parish, LA St. Tammany Parish, LA	0.9391
35644	New York-White Plains-Wayne, NY-NJ Bergen County, NJ Hudson County, NJ Passaic County, NJ Bronx County, NY Kings County, NY New York County, NY Putnam County, NY Queens County, NY Richmond County, NY Rockland County, NY Westchester County, NY	1.3414
35660	Niles-Benton Harbor, MI Berrien County, MI	0.9186
35840	North Port-Bradenton-Sarasota, FL Manatee County, FL Sarasota County, FL	0.9817
35980	Norwich-New London, CT New London County, CT	1.1612
36084	Oakland-Fremont-Hayward, CA Alameda County, CA Contra Costa County, CA	1.6934
36100	Ocala, FL Marion County, FL	0.8768
36140	Ocean City, NJ Cape May County, NJ	1.1265
36220	Odessa, TX Ector County, TX	0.9770
36260	Ogden-Clearfield, UT Davis County, UT Morgan County, UT Weber County, UT	0.9595
36420	Oklahoma City, OK Canadian County, OK Cleveland County, OK Grady County, OK Lincoln County, OK Logan County, OK McClain County, OK Oklahoma County, OK	0.9192
36500	Olympia, WA Thurston County, WA	1.1668
36540	Omaha-Council Bluffs, NE-IA Harrison County, IA Mills County, IA Pottawattamie County, IA Cass County, NE Douglas County, NE Sarpy County, NE Saunders County, NE Washington County, NE	0.9923
36740	Orlando-Kissimmee-Sanford, FL Lake County, FL Orange County, FL Osceola County, FL Seminole County, FL	0.9488
36780	Oshkosh-Neenah, WI Winnebago County, WI	0.9905

36980	Owensboro, KY Daviess County, KY Hancock County, KY McLean County, KY	0.8667
37100	Oxnard-Thousand Oaks-Ventura, CA Ventura County, CA	1.2816
37340	Palm Bay-Melbourne-Titusville, FL Brevard County, FL	0.9537
37380	Palm Coast, FL Flagler County, FL	0.8703
37460	Panama City-Lynn Haven-Panama City Beach, FL Bay County, FL	0.8236
37620	Parkersburg-Marietta-Vienna, WV-OH Washington County, OH Pleasants County, WV Wirt County, WV Wood County, WV	0.8000
37700	Pascagoula, MS George County, MS Jackson County, MS	0.8593
37764	Peabody, MA Essex County, MA	1.1368
37860	Pensacola-Ferry Pass-Brent, FL Escambia County, FL Santa Rosa County, FL	0.8546
37900	Peoria, IL Marshall County, IL Peoria County, IL Stark County, IL Tazewell County, IL Woodford County, IL	0.9473
37964	Philadelphia, PA Bucks County, PA Chester County, PA Delaware County, PA Montgomery County, PA Philadelphia County, PA	1.1186
38060	Phoenix-Mesa-Glendale, AZ Maricopa County, AZ Pinal County, AZ	1.1019
38220	Pine Bluff, AR Cleveland County, AR Jefferson County, AR Lincoln County, AR	0.8296
38300	Pittsburgh, PA Allegheny County, PA Armstrong County, PA Beaver County, PA Butler County, PA Fayette County, PA Washington County, PA Westmoreland County, PA	0.8910
38340	Pittsfield, MA Berkshire County, MA	1.0739
38540	Pocatello, ID Bannock County, ID Power County, ID	0.9844
38660	Ponce, PR Juana Díaz Municipio, PR Ponce Municipio, PR Villalba Municipio, PR	0.4975
38860	Portland-South Portland-Biddeford, ME Cumberland County, ME Sagadahoc County, ME York County, ME	1.0250
38900	Portland-Vancouver-Hillsboro, OR-WA Clackamas County, OR Columbia County, OR Multnomah County, OR Washington County, OR Yamhill County, OR Clark County, WA Skamania County, WA	1.1883
38940	Port St. Lucie, FL Martin County, FL St. Lucie County, FL	1.1103
39100	Poughkeepsie-Newburgh-Middletown, NY Dutchess County, NY Orange County, NY	1.1756
39140	Prescott, AZ Yavapai County, AZ	1.2668
39300	Providence-New Bedford-Fall River, RI-MA Bristol County, MA Bristol County, RI Kent County, RI Newport County, RI Providence County, RI Washington County, RI	1.1094

39340	Provo-Orem, UT Juab County, UT Utah County, UT	0.9651
39380	Pueblo, CO Pueblo County, CO	0.9030
39460	Punta Gorda, FL Charlotte County, FL	0.9069
39540	Racine, WI Racine County, WI	1.0955
39580	Raleigh-Cary, NC Franklin County, NC Johnston County, NC Wake County, NC	1.0159
39660	Rapid City, SD Meade County, SD Pennington County, SD	1.0812
39740	Reading, PA Berks County, PA	0.9220
39820	Redding, CA Shasta County, CA	1.4635
39900	Reno-Sparks, NV Storey County, NV Washoe County, NV	1.0788
40060	Richmond, VA Amelia County, VA Caroline County, VA Charles City County, VA Chesterfield County, VA Cumberland County, VA Dinwiddie County, VA Goochland County, VA Hanover County, VA Henrico County, VA King and Queen County, VA King William County, VA Louisa County, VA New Kent County, VA Powhatan County, VA Prince George County, VA Sussex County, VA Colonial Heights City, VA Hopewell City, VA Petersburg City, VA Richmond City, VA	1.0003
40140	Riverside-San Bernardino-Ontario, CA Riverside County, CA San Bernardino County, CA	1.1980
40220	Roanoke, VA Botetourt County, VA Craig County, VA Franklin County, VA Roanoke County, VA Roanoke City, VA Salem City, VA	0.9140
40340	Rochester, MN Dodge County, MN Olmsted County, MN Wabasha County, MN	1.1330
40380	Rochester, NY Livingston County, NY Monroe County, NY Ontario County, NY Orleans County, NY Wayne County, NY	0.8900
40420	Rockford, IL Boone County, IL Winnebago County, IL	1.0389
40484	Rockingham County-Strafford County, NH Rockingham County, NH Strafford County, NH	1.0381
40580	Rocky Mount, NC Edgecombe County, NC Nash County, NC	0.9354
40660	Rome, GA Floyd County, GA	0.8941
40900	Sacramento--Arden-Arcade--Roseville, CA El Dorado County, CA Placer County, CA Sacramento County, CA Yolo County, CA	1.4551
40980	Saginaw-Saginaw Township North, MI Saginaw County, MI	0.9037
41060	St. Cloud, MN Benton County, MN Stearns County, MN	1.1433
41100	St. George, UT Washington County, UT	0.9457

41140	St. Joseph, MO-KS	1.0667
	Doniphan County, KS	
	Andrew County, MO	
	Buchanan County, MO	
	DeKalb County, MO	
41180	St. Louis, MO-IL	0.9412
	Bond County, IL	
	Calhoun County, IL	
	Clinton County, IL	
	Jersey County, IL	
	Macoupin County, IL	
	Madison County, IL	
	Monroe County, IL	
	St. Clair County, IL	
	Crawford County, MO	
	Franklin County, MO	
	Jefferson County, MO	
	Lincoln County, MO	
	St. Charles County, MO	
	St. Louis County, MO	
	Warren County, MO	
	Washington County, MO	
	St. Louis City, MO	
41420	Salem, OR	1.1528
	Marion County, OR	
	Polk County, OR	
41500	Salinas, CA	1.6242
	Monterey County, CA	
41540	Salisbury, MD	0.9324
	Somerset County, MD	
	Wicomico County, MD	
41620	Salt Lake City, UT	0.9594
	Salt Lake County, UT	
	Summit County, UT	
	Tooele County, UT	
41660	San Angelo, TX	0.8597
	Irion County, TX	
	Tom Green County, TX	
41700	San Antonio-New Braunfels, TX	0.9317
	Atascosa County, TX	
	Bandera County, TX	
	Bexar County, TX	
	Comal County, TX	
	Guadalupe County, TX	
	Kendall County, TX	
	Medina County, TX	
	Wilson County, TX	
41740	San Diego-Carlsbad-San Marcos, CA	1.2403
	San Diego County, CA	
41780	Sandusky, OH	0.8994
	Erie County, OH	
41884	San Francisco-San Mateo-Redwood City, CA	1.6291
	Marin County, CA	
	San Francisco County, CA	
	San Mateo County, CA	
41900	San Germán-Cabo Rojo, PR	0.5244
	Cabo Rojo Municipio, PR	
	Lajas Municipio, PR	
	Sabana Grande Municipio, PR	
	San Germán Municipio, PR	
41940	San Jose-Sunnyvale-Santa Clara, CA	1.7295
	San Benito County, CA	
	Santa Clara County, CA	
41980	San Juan-Caguas-Guaynabo, PR	0.4940
	Aguas Buenas Municipio, PR	
	Aibonito Municipio, PR	
	Arecibo Municipio, PR	
	Barceloneta Municipio, PR	
	Barranquitas Municipio, PR	
	Bayamón Municipio, PR	
	Caguas Municipio, PR	
	Camuy Municipio, PR	
	Canóvanas Municipio, PR	
	Carolina Municipio, PR	
	Cataño Municipio, PR	
	Cayey Municipio, PR	
	Ciales Municipio, PR	
	Cidra Municipio, PR	
	Comerío Municipio, PR	
	Corozal Municipio, PR	
	Dorado Municipio, PR	
	Florida Municipio, PR	
	Guaynabo Municipio, PR	
	Gurabo Municipio, PR	

	Hatillo Municipio, PR Humacao Municipio, PR Juncos Municipio, PR Las Piedras Municipio, PR Loíza Municipio, PR Manatí Municipio, PR Maunabo Municipio, PR Morovis Municipio, PR Naguabo Municipio, PR Naranjito Municipio, PR Orocovis Municipio, PR Quebradillas Municipio, PR Río Grande Municipio, PR San Juan Municipio, PR San Lorenzo Municipio, PR Toa Alta Municipio, PR Toa Baja Municipio, PR Trujillo Alto Municipio, PR Vega Alta Municipio, PR Vega Baja Municipio, PR Yabucoa Municipio, PR	
42020	San Luis Obispo-Paso Robles, CA San Luis Obispo County, CA	1.3373
42044	Santa Ana-Anaheim-Irvine, CA Orange County, CA	1.2593
42060	Santa Barbara-Santa Maria-Goleta, CA Santa Barbara County, CA	1.2331
42100	Santa Cruz-Watsonville, CA Santa Cruz County, CA	1.7333
42140	Santa Fe, NM Santa Fe County, NM	1.1231
42220	Santa Rosa-Petaluma, CA Sonoma County, CA	1.6715
42340	Savannah, GA Bryan County, GA Chatham County, GA Effingham County, GA	0.9223
42540	Scranton--Wilkes-Barre, PA Lackawanna County, PA Luzerne County, PA Wyoming County, PA	0.8530
42644	Seattle-Bellevue-Everett, WA King County, WA Snohomish County, WA	1.1966
42680	Sebastian-Vero Beach, FL Indian River County, FL	0.9419
43100	Sheboygan, WI Sheboygan County, WI	0.9560
43300	Sherman-Denison, TX Grayson County, TX	0.8572
43340	Shreveport-Bossier City, LA Bossier Parish, LA Caddo Parish, LA De Soto Parish, LA	0.8838
43580	Sioux City, IA-NE-SD Woodbury County, IA Dakota County, NE Dixon County, NE Union County, SD	0.9413
43620	Sioux Falls, SD Lincoln County, SD McCook County, SD Minnehaha County, SD Turner County, SD	0.9629
43780	South Bend-Mishawaka, IN-MI St. Joseph County, IN Cass County, MI	1.0301
43900	Spartanburg, SC Spartanburg County, SC	0.9716
44060	Spokane, WA Spokane County, WA	1.0946
44100	Springfield, IL Menard County, IL Sangamon County, IL	0.9454
44140	Springfield, MA Franklin County, MA Hampden County, MA Hampshire County, MA	1.0614
44180	Springfield, MO Christian County, MO Dallas County, MO Greene County, MO Polk County, MO Webster County, MO	0.8668
44220	Springfield, OH Clark County, OH	0.9561
44300	State College, PA Centre County, PA	0.9090
44600	Steubenville-Weirton, OH-WV Jefferson County, OH Brooke County, WV Hancock County, WV	0.8000

44700	Stockton, CA San Joaquin County, CA	1.3092
44940	Sumter, SC Sumter County, SC	0.8139
45060	Syracuse, NY Madison County, NY Onondaga County, NY Oswego County, NY	1.0256
45104	Tacoma, WA Pierce County, WA	1.1745
45220	Tallahassee, FL Gadsden County, FL Jefferson County, FL Leon County, FL Wakulla County, FL	0.9118
45300	Tampa-St. Petersburg-Clearwater, FL Hernando County, FL Hillsborough County, FL Pasco County, FL Pinellas County, FL	0.9375
45460	Terre Haute, IN Clay County, IN Sullivan County, IN Vermillion County, IN Vigo County, IN	0.9531
45500	Texarkana, TX-Texarkana, AR Miller County, AR Bowie County, TX	0.8023
45780	Toledo, OH Fulton County, OH Lucas County, OH Ottawa County, OH Wood County, OH	0.9766
45820	Topeka, KS Jackson County, KS Jefferson County, KS Osage County, KS Shawnee County, KS Wabaunsee County, KS	0.9269
45940	Trenton-Ewing, NJ Mercer County, NJ	1.0510
46060	Tucson, AZ Pima County, AZ	0.9816
46140	Tulsa, OK Creek County, OK Okmulgee County, OK Osage County, OK Pawnee County, OK Rogers County, OK Tulsa County, OK Wagoner County, OK	0.9105
46220	Tuscaloosa, AL Greene County, AL Hale County, AL Tuscaloosa County, AL	0.9156
46340	Tyler, TX Smith County, TX	0.8351
46540	Utica-Rome, NY Herkimer County, NY Oneida County, NY	0.8771
46660	Valdosta, GA Brooks County, GA Echols County, GA Lanier County, GA Lowndes County, GA	0.8222
46700	Vallejo-Fairfield, CA Solano County, CA	1.5460
47020	Victoria, TX Calhoun County, TX Goliad County, TX Victoria County, TX	0.8510
47220	Vineland-Millville-Bridgeton, NJ Cumberland County, NJ	1.0907
47260	Virginia Beach-Norfolk-Newport News, VA-NC Currituck County, NC Gloucester County, VA Isle of Wight County, VA James City County, VA Mathews County, VA Surry County, VA York County, VA Chesapeake City, VA Hampton City, VA Newport News City, VA Norfolk City, VA Poquoson City, VA Portsmouth City, VA Suffolk City, VA Virginia Beach City, VA	0.9279

	Williamsburg City, VA	
47300	Visalia-Porterville, CA Tulare County, CA	1.1119
47380	Waco, TX McLennan County, TX	0.8701
47580	Warner Robins, GA Houston County, GA	0.8312
47644	Warren-Troy-Farmington Hills, MI Lapeer County, MI Livingston County, MI Macomb County, MI Oakland County, MI St. Clair County, MI	0.9990
47894	Washington-Arlington-Alexandria, DC-VA-MD-WV District of Columbia, DC Calvert County, MD Charles County, MD Prince George's County, MD Arlington County, VA Clarke County, VA Fairfax County, VA Fauquier County, VA Loudoun County, VA Prince William County, VA Spotsylvania County, VA Stafford County, VA Warren County, VA Alexandria City, VA Fairfax City, VA Falls Church City, VA Fredericksburg City, VA Manassas City, VA Manassas Park City, VA Jefferson County, WV	1.1103
47940	Waterloo-Cedar Falls, IA Black Hawk County, IA Bremer County, IA Grundy County, IA	0.8762
48140	Wausau, WI Marathon County, WI	0.9902
48300	Wenatchee-East Wenatchee, WA Chelan County, WA Douglas County, WA	0.9956
48424	West Palm Beach-Boca Raton-Boynton Beach, FL Palm Beach County, FL	1.0286
48540	Wheeling, WV-OH Belmont County, OH Marshall County, WV Ohio County, WV	0.7676
48620	Wichita, KS Butler County, KS Harvey County, KS Sedgwick County, KS Sumner County, KS	0.9213
48660	Wichita Falls, TX Archer County, TX Clay County, TX Wichita County, TX	0.9905

48700	Williamsport, PA Lycoming County, PA	0.8000
48864	Wilmington, DE-MD-NJ New Castle County, DE Cecil County, MD Salem County, NJ	1.0955
48900	Wilmington, NC Brunswick County, NC New Hanover County, NC Pender County, NC	0.9528
49020	Winchester, VA-WV Frederick County, VA Winchester City, VA Hampshire County, WV	1.0356
49180	Winston-Salem, NC Davie County, NC Forsyth County, NC Stokes County, NC Yadkin County, NC	0.9256
49340	Worcester, MA Worcester County, MA	1.1402
49420	Yakima, WA Yakima County, WA	1.0424
49500	Yauco, PR Guánica Municipio, PR Guayanilla Municipio, PR Peñuelas Municipio, PR Yauco Municipio, PR	0.4066
49620	York-Hanover, PA York County, PA	1.0337
49660	Youngstown-Warren-Boardman, OH-PA Mahoning County, OH Trumbull County, OH Mercer County, PA	0.8931
49700	Yuba City, CA Sutter County, CA Yuba County, CA	1.1434
49740	Yuma, AZ Yuma County, AZ	0.9612

[1]This column lists each CBSA area name and each county or county equivalent, in the CBSA area. Counties not listed in this Table are considered to be rural areas. Wage index values for rural areas are found in Addendum (B).

[2]Wage index values are based on FY 2007 hospital cost report data before reclassification. These data form the basis for the pre-floor, pre-reclassified hospital wage index. The budget neutrality adjustment factor (BNAF) or the hospital floor is then applied to the pre-floor, pre-reclassified hospital wage index to derive the hospice wage index. Wage index values greater than or equal to 0.8 are subject to a BNAF. The hospice floor calculation is as follows: wage index values below 0.8 are adjusted to be the greater or a) the 40 percent reduced BNAF OR b) the minimum of the pre-floor, pre-reclassified hospital wage index value x 1.15, or 0.8000.

For the FY 2012 hospice wage index, the BNAF was reduced by a total of 40 percent.

[3]Because there are no hospitals in this CBSA, the wage index value is calculated by taking the average of all other urban CBSAs in Georgia.

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Part III

Department of Transportation

Federal Motor Carrier Safety Administration

49 CFR Parts 383, 384 and 385
Commercial Driver's License Testing and Commercial Learner's Permit Standards; Final Rule

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

49 CFR Parts 383, 384, and 385

[Docket No. FMCSA–2007–27659]

RIN 2126–AB02

Commercial Driver's License Testing and Commercial Learner's Permit Standards

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Final rule.

SUMMARY: FMCSA amends the commercial driver's license (CDL) knowledge and skills testing standards and establishes new minimum Federal standards for States to issue the commercial learner's permit (CLP). The rule requires that a CLP holder meet virtually the same requirements as those for a CDL holder, meaning that a driver holding a CLP will be subject to the same driver disqualification penalties that apply to a CDL holder. This final rule also implements section 4019 of the Transportation Equity Act for the 21st Century (TEA–21), section 4122 of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA–LU), and section 703 of the Security and Accountability For Every Port Act of 2006 (SAFE Port Act). It will enhance safety by ensuring that only qualified drivers are allowed to operate commercial motor vehicles on our nation's highways.

DATES: *Effective date:* This final rule is effective on July 8, 2011.

Compliance Date: States must be in compliance with the requirements in subpart B of Part 384 (49 CFR part 384) by July 8, 2014.

Petitions for Reconsideration of any amendment made by this final rule must be received on or before June 8, 2011. Any petition for reconsideration submitted after this date will not be considered.

ADDRESSES: Petitions for reconsideration should refer to Docket ID Number FMCSA–2007–27659 or RIN 2126–AB02, and be submitted to the Administrator, Federal Motor Carrier Safety Administration, by any of the following methods:

• *Mail to:* Administrator, Federal Motor Carrier Safety Administration (MC–A), West Building-6th Floor, Room W60–308, 1200 New Jersey Avenue, SE., Washington, DC 20590.

• *Hand-Deliver:* Docket Operations Unit, U.S. Department of Transportation, West Building-Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

• *Federal eRulemaking portal* at *http://www.regulations.gov.* All petitions for reconsideration will be posted on the Federal eRulemaking portal in Docket "FMCSA–2007–27659". This final rule and all background documents and material related to this rule may be viewed and copied at *http://www.regulations.gov,* by typing "FMCSA–2007–27659". The docket may also be viewed and copied for a fee at the U.S. Department of Transportation, Docket Operations, West Building-Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Robert Redmond, Office of Safety Programs, Commercial Driver's License Division, telephone (202) 366–5014 or e-mail *robert.redmond@dot.gov.* Office hours are from 8 a.m. to 4:30 p.m.

SUPPLEMENTARY INFORMATION:

I. Legal Basis

This rule is based on the broad authority of the Commercial Motor Vehicle Safety Act of 1986 (CMVSA) (Pub. L. 99–570, Title XII, 100 Stat. 3207–170, 49 U.S.C. chapter 313); the Motor Carrier Safety Act of 1984 (MCSA) (Pub. L. 98–554, Title II, 98 Stat. 2832, 49 U.S.C. 31136); and the Motor Carrier Act of 1935 (MCA) (Chapter 498, 49 Stat. 543, 49 U.S.C. 31502). It is also based on section 4019 of the Transportation Equity Act for the 21st Century (TEA–21), section 4122 of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA–LU) (Pub. L. 109–59, 119 Stat. 1144, at 1734, 49 U.S.C. 31302, 31308, and 31309); and section 703 of the Security and Accountability For Every Port Act of 2006 (SAFE Port Act) (Pub. L. 109–347, 120 Stat. 1884, at 1944).

The CMVSA required the Secretary of Transportation, after consultation with the States, to prescribe regulations on minimum uniform standards for the issuance of commercial driver's licenses (CDLs) by the States and for information to be contained on each license (49 U.S.C. 31305, 31308). The CMVSA also authorized the Secretary to adopt regulations for a learner's permit (49 U.S.C. 31305(b)(2)). Paragraph (c) of 49 CFR 383.23 addresses the learner's permit by ratifying the States' regulations on this subject, provided they comply with certain Federal requirements. This final rule establishes a Federal requirement for a commercial learner's permit (CLP) as a pre-condition for issuing a CDL and also adopts various other changes to enhance the CDL program.

The MCSA conferred authority to regulate drivers, motor carriers, and commercial motor vehicles (CMVs). It required the Secretary of Transportation to "prescribe regulations on commercial motor vehicle safety. The regulations shall prescribe minimum safety standards for commercial motor vehicles. At a minimum, the regulations shall ensure that: (1) Commercial motor vehicles are maintained, equipped, loaded, and operated safely; (2) the responsibilities imposed on operators of commercial motor vehicles do not impair their ability to operate the vehicles safely; (3) the physical condition of operators of commercial motor vehicles is adequate to enable them to operate the vehicles safely; and (4) the operation of commercial motor vehicles does not have a deleterious effect on the physical condition of the operators" (49 U.S.C. 31136(a)).

This final rule, like the CDL regulations, is based in part on the requirements of 49 U.S.C. 31136(a)(1) and (2) that CMVs be "operated safely" and that "the responsibilities imposed on [CMV drivers] do not impair their ability to operate the vehicles safely." The changes to 49 CFR part 383 of this rule will help to ensure that drivers who operate CMVs are licensed to do so and that they do not operate CMVs without having passed the requisite tests.

The MCA authorized the Secretary of Transportation to prescribe requirements for the "qualifications * * * of employees" of for-hire and private motor carriers (49 U.S.C. 31502(b)). This rule, like the CDL regulations, is based in part on that authority and is intended to enhance the qualifications of CMV drivers by ensuring that they obtain a CLP before applying for a CDL.

Section 4019 of TEA–21 required the Department of Transportation (DOT) to complete a review of the CDL testing system to determine if the current CDL system is an accurate measure of an individual's knowledge and skills as an operator of a CMV. It also authorized the Agency to issue regulations reflecting the results of its review. This rule includes new or enhanced requirements adopted in response to the Agency's review.

Section 4122 of SAFETEA–LU required the DOT to prescribe regulations on minimum uniform standards for the issuance of CLPs, as it has already done for CDLs (49 U.S.C. 31308(2)). More specifically, section 4122 provided that an applicant for a CLP must first pass a knowledge test which complies with minimum standards prescribed by the Secretary and may have only one CLP at a time; that the CLP document must have the same information and security features as the CDL; and that a driver's record must be created for each CLP holder in the Commercial Driver's License Information System (CDLIS).[1] This rule includes each of those requirements, as explained in more detail in the preamble to this rule.

Section 703(a) of the SAFE Port Act required the Secretary of Transportation to issue regulations implementing the recommendations contained in a memorandum issued by the DOT's Office of the Inspector General (OIG) on June 4, 2004, concerning verification of the legal status of commercial drivers. Section 703(b) required the Secretary, in cooperation with the Department of Homeland Security, to issue a regulation to implement the recommendations contained in a report issued by the OIG on February 7, 2006 ["Oversight of the Commercial Driver's License Program"] that set forth steps needed to improve anti-fraud measures in the CDL program. In a 2002 CDL audit report, the OIG recommended that FMCSA require testing protocols and performance oriented requirements for English language proficiency. This final rule incorporates all of the OIG's recommendations. A discussion of these recommendations can be found in the preamble to the NPRM for this rule. Many of the operational procedures suggested by the OIG for carrying out the recommendations have also been adopted.

In addition to the specific legal authorities discussed above, FMCSA is required, before prescribing regulations, to consider the "costs and benefits" of any proposal (49 U.S.C. 31136(c)(2)(A), 31502(d)). The Regulatory Flexibility Analysis prepared for this rule discusses those issues more comprehensively in a separate document filed in the docket.

II. Background

Acronyms and Terms Used in This Document

AAMVA— American Association of Motor Vehicle Administrators
CDL—Commercial Driver's License
CDLIS—Commercial Driver's License Information System
CLP—Commercial Learner's Permit
CMV—Commercial Motor Vehicle
CMVSA— Commercial Motor Vehicle Safety Act of 1986
CFR—Code of Federal Regulations
DHS—Department of Homeland Security
FHWA—Federal Highway Administration
FMCSA—Federal Motor Carrier Safety Administration
GCWR—Gross Combination Weight Rating
GVWR—Gross Vehicle Weight Rating
IBR—Incorporated by Reference
N—Tank Vehicle Endorsement
Non-CDL—Non-Commercial Driver's License
NPRM—Notice of Proposed Rulemaking
OIG—Office of Inspector General
P—Passenger Endorsement
PDPS—Problem Driver Pointer System
S—School Bus Endorsement
SDLA—State Driver Licensing Agency
SSA—Social Security Administration
SSN—Social Security Number

A. Summary of This Rule

FMCSA adopts the following revisions to the CDL knowledge and skills testing standards in response to

[1] CDLIS is an information system that allows the exchange of commercial driver licensing information among all the States. CDLIS includes the databases of fifty-one licensing jurisdictions and the CDLIS Central Site, all connected by a telecommunications network.

the statutory mandates and OIG recommendations:

(1) *Knowledge and skills testing requirements.*

Successful completion of the knowledge test, currently a prerequisite for the CDL, is required before issuance of the CLP. This rule requires States to use driver and examiner reference materials, State testing questions and exercises, and State testing methodologies (herein referred to as State Testing System) that FMCSA has pre-approved. The State Testing System must be comparable to AAMVA's 2005 CDL Test System (July 2010 Version) for knowledge and skill standards, which FMCSA approves in this rule. It includes a prohibition on use of foreign language interpreters in the administration of the knowledge and skills tests, to reduce the potential for fraud.

(2) *Standards for issuing CLPs and CDLs.*

This rule specifically requires that each applicant obtain a CLP and hold it for a minimum of 14 days before applying for a CDL. It establishes a minimum age of 18 for issuance of a CLP. The CLP must be a separate document from the CDL or non-CDL,[2] must be tamperproof to the extent possible, and must include the same information as the CDL. The only endorsements allowed on the CLP are a restricted passenger (P) endorsement, a school bus (S) endorsement, and a tank vehicle (N) endorsement. Each State is required to create a CDLIS record for each CLP it issues.

Before issuing a CLP, the issuing State is required to perform a check of the driver's previous driving record using both CDLIS and the PDPS to ensure the driver is not subject to the sanctions of § 383.51, based on previous motor vehicle violations. If the State discovers that the driver is subject to such sanctions, it must refuse to issue a CLP to the driver.

This rule strengthens the legal presence requirements and increases the documentation required for CLP and CDL applicants to demonstrate their legal presence in the United States. For example, SDLAs are required to verify the applicant's SSN with the SSA. The rule also addresses applicants who wish to attend a driver training school in a State other than the applicant's State of domicile. States are required to recognize CLPs issued by other States for training purposes. The rule limits the initial and renewal periods for both CLPs and CDLs. It clarifies under what circumstances an applicant must surrender his/her CLP, CDL, or non-CDL. It also requires all States to use standardized endorsement and restriction codes on CDLs.

Many of the program areas and issues dealt with in this rule are also addressed in DHS's final rule implementing the REAL ID Act ("Minimum Standards for Driver's Licenses and Identification Cards Acceptable by Federal Agencies for Official Purposes," 73 FR 5272, January 29, 2008, codified in 6 CFR part 37). FMCSA and DHS have coordinated efforts to write regulations that neither overlap nor conflict. The two agencies and the relevant statutory authority underlying these two rules serve different purposes. Although in some limited instances FMCSA has incorporated similar or identical requirements into this final rule, it does not adopt REAL ID or incorporate it by reference either wholly or in part.

(3) *Measures for prevention of fraud.*

This rule includes requirements to improve the ability of States to detect and prevent fraudulent testing and licensing activity in the CDL program. These measures include the following:

- Requiring verification of social security numbers.
- Requiring CLP and CDL applicants to prove legal presence in the United States.
- Requiring that a digitized photo of the driver be preserved by the State driver licensing agency.
- Requiring computer system controls to allow overrides by supervisory personnel only.
- Requiring background checks and formal training for all test examiners.
- Requiring the establishment of oversight systems for all examiners and testers (including third parties).
- Disallowing the use of language interpreters for the knowledge and skills tests.

In addition, amendments to part 384 require these items to be reviewed whenever FMCSA conducts a CDL compliance review of a State program. States found in substantial non-compliance with these fraud control measures, as well as the other requirements of part 384, may be subject to the loss of Federal-aid highway funds.

(4) *Other regulatory changes.*

The rule specifically prohibits a motor carrier from using a driver who does not hold a current and appropriate CLP or CDL to operate a CMV and from using a driver to operate a vehicle in violation of the restrictions on the CLP or CDL. It also incorporates into the regulations current FMCSA guidance related to issues addressed by this rulemaking (currently available on the Internet at "Guidance for Regulations," at *http://www.fmcsa.dot.gov/rules-regulations/administration/fmcsr/fmcsrguide.asp?section_type=G*). Finally, this rule includes minor editorial corrections and updates.

B. History

The CDL program was established by the CMVSA of 1986. Parts 383 and 384 of Title 49, Code of Federal Regulations, implement the CMVSA requirements. The CMVSA prohibits any person who does not hold a valid CDL or learner's permit issued by his/her State of domicile from operating a CMV that requires a driver with a CDL. The prohibition further affects driver training activities by limiting trainees to their State of domicile to (1) receive training and behind-the-wheel experience, and (2) take the knowledge and skills tests necessary to be issued a CDL. This has caused problems because commercial driver training facilities and the type of training needed are not equally available in all States.

To address this and other issues, such as a lack of uniformity in the duration of learner's permits, associated driver history recordkeeping, and test reciprocity among States, the FHWA published an NPRM on August 22, 1990 (55 FR 34478). (In the discussion below, the responsible agency is referred to as the FMCSA, regardless of whether the action described occurred before or after the transfer of responsibility from FHWA to FMCSA in January 2000.)

Since the 1990 NPRM, major changes have occurred in the CDL program through legislation, other rulemakings, regulatory guidance, and policy decisions. For example, in response to the Sept. 11, 2001 terrorist attacks, and because issuance of CDLs to unqualified persons and persons with false identities significantly complicated detection and prevention of fraud, Congress and FMCSA expanded the scope of the CDL program to include issues related to fraud and security. All of these major changes made the 1990 proposal obsolete. Thus, FMCSA withdrew the 1990 NPRM on February 23, 2006 (71 FR 42741). FMCSA issued a new NPRM on April 9, 2008 (73 FR 19282) to address these issues and establish regulatory changes to implement section 4019 of TEA–21, section 4122 of SAFETEA–LU, and section 703 of the SAFE Port Act.

III. Discussion of Comments on the NPRM

On April 9, 2008 FMCSA published an NPRM (73 FR 19282) to revise the

[2] A "non-CDL" is any other type of motor vehicle license, such as an automobile driver's license, a chauffeur's license, or a motorcycle license.

standards for CDL testing and to require new standards for a CLP. Comments were initially due by June 9, 2008. However, in response to several requests, FMCSA extended the comment period until July 9, 2008 (73 FR 32520). In response to the NPRM, FMCSA received 103 comments. Commenters included representatives from Federal, State, and local government and enforcement agencies, industry, trade associations, advocacy groups, driver trainers, commercial motor vehicle drivers, individuals and national associations representing various transportation interests. Table 1 presents a commenter name and abbreviation list.

TABLE 1—LIST OF COMMENTERS

Name of commenter	Abbreviated name
Advocates for Highway and Auto Safety	Advocates.
Alabama Department of Public Safety	Alabama.
American Moving and Storage Association	AMSA.
Arkansas Department of Finance and Administration	Arkansas.
U.S. Department of the Army	Army.
American Trucking Associations	ATA.
B–J School Buses, Inc	B–J School Bus.
California Department of Motor Vehicles	California.
C.R. England, Inc	CR England.
CRST Van Expedited, Inc	CRST.
California Trucking Association	CTA.
Commercial Vehicle Training Association, Inc	CVTA.
Delaware Department of Transportation, DMV	Delaware.
Driver Holdings, LLC	Driver Holdings.
Elgin Community College	Elgin CC.
Farris Brothers, Inc	Farris Bros.
Florence School District One	Florence S–D.
Florida Dept of Highway Safety and Motor Vehicles	Florida.
Georgia Department of Driver Services	Georgia.
Idaho Department of Motor Vehicles	Idaho.
Illinois Fertilizer and Chemical Assoc	IFCA.
Driver Services Dept—Illinois Office of the Secretary of State	Illinois.
Indiana Association of Rural Electric Cooperatives	Indiana Rural Electrics.
International Union of Operating Engineers National Training Fund	IUOE.
Joint School District #2, Idaho 2	Joint School District.
John Wood Community College	Wood CC.
Louisiana Office of Motor Vehicles	Louisiana.
Michigan Department of State	Michigan.
Minnesota Department of Public Safety	Minnesota.
Missouri Department of Revenue & Missouri State Highway Patrol; Missouri Department of Transportation	Missouri.
National Automobile Dealers Association	NADA.
Nebraska Agri-Business Association	NE Agri-Business.
Nebraska Department of Motor Vehicles	Nebraska.
New York DMV Motor Carrier Bureau	New York.
North Dakota Department of Transportation	North Dakota.
National School Transportation Association	NSTA.
Ohio State Highway Patrol	Ohio.
Oklahoma Department of Public Safety	Oklahoma.
Owner-Operator Independent Drivers Association, Inc	OOIDA.
Oregon DMV	Oregon.
Pennsylvania Department of Transportation	Pennsylvania.
Schneider National, Inc	Schneider.
South Carolina DMV	South Carolina.
South Dakota Driver Licensing Program	South Dakota.
Truckload Carriers Association	TCA.
Tennessee Department of Safety	Tennessee.
Texas Dept of Public Safety	Texas.
Commonwealth of Virginia DMV	Virginia.
Washington State Dept of Licensing	Washington.
Wisconsin Dept of Transportation	Wisconsin.
Winkle Bus Company	Winkle.
Wyoming Joint Transportation, Highways & Military Affairs Committee	Wyoming.

This final rule responds to the comments received on the 17 issues addressed in the NPRM preamble. The 18th section addresses issues related to fraud prevention and the 19th section addresses miscellaneous comments not specifically associated with any of the 17 original issues or fraud prevention.

1. Strengthen Legal Presence Requirement

a. Required Forms/Documents

FMCSA proposed amending § 383.71 to include a list of acceptable documents to prove citizenship or legal presence.

Comments. Advocates, CRST, Elgin CC and the State of Tennessee supported the proposed change. DHS recommended either using the list of acceptable documents for establishing lawful status, which it published as a part of the REAL ID rule, or adopting REAL ID's method for verifying lawful

status. Michigan supported harmonizing requirements with REAL ID.

FMCSA Response. The final rule adopts the appropriate documents from the most recent list that DHS adopted for proof of citizenship or legal presence under REAL ID. (*See* 73 FR 5272; January 29, 2008.) Use of this list will ensure greater compatibility with DHS programs including REAL ID.

b. Nonresident CDL

FMCSA proposed amending §§ 383.5, 383.23, 383.71 and 383.73 to reinforce "State of domicile," as previously defined in the regulations, by specifying that a State may only issue a CLP or CDL to an applicant who is a U.S. citizen or lawful permanent resident. Under the proposal, applicants domiciled either in a foreign country other than those granted reciprocity by the Administrator, or in a State that had its CDL program decertified may be issued a Nonresident CLP or CDL.

Comments. DHS objected to the term "Nonresident" because it is used differently for immigration purposes and could cause confusion. Under their current systems, Florida and New York already issue licenses to drivers who would qualify for Nonresident CLPs and CDLs under the proposed rule, but object to the change on the grounds that it would be burdensome to create a new category of license. Virginia does not currently issue CDLs to drivers domiciled in foreign countries and is opposed to expending resources to create this new category of license. Tennessee objected to Nonresident CLPs and CDLs without explanation.

FMCSA Response. The final rule changes the term "Nonresident" to "Non-domiciled" for both CLPs and CDLs. This change will provide greater consistency with FMCSA's authorizing statute, which bases jurisdictional authority to issue CDLs on domicile, not residency. In addition, the change to "Non-domiciled" will avoid confusion and eliminate any actual or perceived conflicts with DHS' immigration programs. Other than the change to "Non-domiciled," the rule remains as proposed in the final rule.

2. Social Security Number Verification Before Issuing a CLP or CDL

FMCSA proposed amending § 383.73(g) to require States to verify certain identifying information (*e.g.,* name, date of birth, and SSN) submitted on the license application with the information on file with the SSA. The States would be prohibited from issuing, renewing, upgrading, or transferring a CDL if the information in the SSA database does not match applicant-provided data. FMCSA proposed that the SSN verification would only have to be performed once for each CLP or CDL applicant if a notation is placed on the driver record that the verification was done and the results matched information provided by the applicant.

Comments. Georgia, Michigan, NADA, AMSA, and a community college support the proposal. Minnesota commented that the proposal may not consistently protect against or identify those applicants presenting false identities and that the process is burdensome and cost prohibitive. CRST supports the proposal only if the States are capable of managing the process without delays. Farris Bros. expressed concerns about privacy and information security. New York requested an exemption to this provision when an applicant presents a letter confirming the applicant has resolved a problem with a name or date of birth not matching the information in the SSA database.

FMCSA Response. The SSN verification requirement remains as proposed in the NPRM. FMCSA views this requirement as a basic yet critical fraud prevention measure. FMCSA disagrees that this requirement is burdensome. Approximately 45 States currently conduct SSN verification for CDL applicants. Furthermore, verification is neither a lengthy process nor expensive (approximately $.025 for batch and $.03 for online transactions). FMCSA declines to adopt New York's exemption request. Verifying directly with the SSA that an applicant's name, date of birth and SSN all match after a discrepancy has been resolved is necessary to prevent fraud.

3. Surrender Of CLP, CDL and Non-CDL Documents

a. Surrender of Documents

FMCSA proposed amending §§ 383.71, 383.73 and 384.211 and adding § 383.25 to expand the current CLP and CDL surrender requirements to include any transaction where a CLP is being upgraded or a CDL is being initially issued, upgraded, or transferred.

Comments. Florida and a community college support the proposal. Advocates supports the proposal but states that the language is ambiguous as to whether it is mandatory or optional. Georgia commented that 49 CFR 384.211 requires CDL applicants to surrender all previously issued CDLs and, therefore, it already complies with the proposed rule. Delaware commented that the proposal is unnecessary because an applicant's identity can be verified through other documents and electronic systems. New York commented that since it does not issue over-the-counter documents, applicants could be without any photo identification until the new or replaced CLP or CDL arrives in the mail. New York suggested perforating instead of surrendering documents. Michigan suggested that the Agency adopt a standardized document invalidation process such as clipping the corner of the prior document. Minnesota complained that finding a vendor to perforate old documents with the word "VOID" would be expensive.

FMCSA Response. The surrender requirement is mandatory and remains as proposed. FMCSA disagrees that it is unnecessary to surrender prior documents. The surrender requirement is necessary to prevent fraud in the form of a driver holding more than one CDL document. Moreover, the rules recognize that not all States issue CDL documents over-the-counter and include an alternative standardized document invalidation process. As proposed in the NPRM, FMCSA is incorporating its guidance on stewardship requirements for surrendered documents into the final rule. As a result, the final rule provides for an alternative to surrender: Perforating old documents with the word "VOID."

b. Mailing of Initial License

FMCSA proposed amending § 383.73 to require that States may only issue an initial CDL or CLP by mailing it to the address a driver provided on his/her application form.

Comments. South Dakota opposed issuing CLPs by mail because States with over-the-counter procedures would have to develop special procedures. Florida claimed that the benefits associated with this change do not justify the costs required to establish a mailing system. North Dakota and Oklahoma argued that the proof of domicile requirement renders the mailing requirement unnecessary. Oklahoma further complained that forcing States to adopt central issuance would be costly. Tennessee questioned whether FMCSA is in fact requiring all States to change to a central issuance system. Georgia commented that if mailing is required, then States should be able to issue interim temporary CDLs over-the-counter. Illinois stated that unless the States are permitted to choose between mailing and implementing an address verification program, FMCSA is essentially mandating that the State adopt central issuance. Michigan does not believe that its practice of issuing CDLs and CLPs

over-the-counter contributes to fraud. ATA, Driver Holdings and CR England complained that mailing will cause unnecessary delays for CLP holders entering driving schools. ATA further noted that DHS does not require mailing in the REAL ID rules.

FMCSA Response. FMCSA has removed the requirement that States issue initial CLPs and CDLs by mail. This change is consistent with DHS's REAL ID rules and provides States with more flexibility, without a demonstrated reduction in fraud prevention, because, presumably, the same documents that are presented to prove domicile are used to verify mailing addresses. In addition, this change will prevent delays in applicants receiving CDLs and CLPs and will reduce the States' cost of compliance.

4. CDL Testing Requirements for Out-of-State Driver Training School Students

FMCSA proposed to add § 383.79 to provide that a person who holds a CLP would be able to take the CDL skills test outside of his/her State of domicile. The testing State would then send the skills test results to the State of domicile. The State of domicile would accept the results of the skills test and, if the applicant passed, would issue a CDL.

Comments. Advocates and an individual driver supported this proposal because reciprocity would increase national uniformity. NADA and AMSA also supported the concept of reciprocity. However, this proposal generated significant negative comments. CVTA commented that lack of uniform State testing standards would promote shopping for a State with the lowest testing standards. It also commented that many States do not grant reciprocity for CDLs, instead requiring even experienced drivers to retest. ATA, CVTA and CTA preferred temporary nonresident CDLs as an alternative. These associations, a number of carriers, a driver trainer and an individual driver commented that the proposed rule would require costly and time-consuming travel as well as delays to starting company-administered training and employment. Several trainers praised Illinois's high standards and objected to any rule that would inhibit the State's ability to do what it deemed necessary.

All of the State agencies that submitted comments had issues with the proposal. The principal complaint was that the individual States would lose control over the integrity of the testing process. States that employ stringent anti-fraud measures in the testing process object to being required to accept results from States that are relatively lax. States that had previous experience with testing fraud were particularly opposed. Texas commented that the proposal had the potential for a significant increase in fraud because the State that issued the CDL would have no recourse against testers outside its jurisdiction. Several States suggested that FMCSA change the requirement to permit, but not require, reciprocity. Several States also complained that the proposed rule would increase costs in terms of program, procedure and training changes. A number of States had specific concerns about the electronic transmission of information between States and the costs associated with implementing an electronic system.

FMCSA Response. After careful consideration of these comments, FMCSA has determined that the final rule will remain as proposed. States are required to accept the results of a skills test administered to an applicant by any other State. FMCSA is confident that the upgraded skills test and anti-fraud standards required and implemented by this rule will improve and standardize both skills testing and fraud prevention, creating more uniformity across all States' CDL programs.

In addition, FMCSA believes that the new rule will help reduce barriers to entry into the driver labor market. Under current law and regulations, a driver may only obtain a CDL or CLP from his/her State of domicile. The new rule will facilitate driver training for applicants unable to train in the State of domicile. In addition, training schools often provide applicants with use of a truck for testing purposes. For many applicants, this is the only feasible option for testing. If applicants are required to return to their States of domicile for testing, they would have to secure use of a truck, obtain insurance and/or incur the cost of renting a truck simply to take the test. For many this is logistically or financially prohibitive.

The travel costs raised by carriers in their comments are not related to the proposed rule change. Currently, many States do not enforce the requirement that only the State of domicile may issue a CDL or CLP. As a result, drivers are avoiding the travel costs associated with the return to the State of domicile by obtaining CDLs from States other than their States of domicile, in violation of federal statute and FMCSA's rules. With or without the rule change, these costs exist. It does not appear unreasonable to require a driver applicant to return to his/her State of domicile because this is where, by definition, he/she makes his/her permanent home and is the jurisdiction to which he/she intends to return.

FMCSA leaves it to the States to determine what secure electronic method of transmitting test scores works best for them. At least one State currently has an electronic database that can be used for the transmission of test results between States. Other States may prefer to use more basic methods of electronic transmission such as e-mail.

5. State Reciprocity for CLPs

FMCSA proposed amending § 384.214 to allow a person to obtain a CLP from his/her jurisdiction of licensure and then engage in CMV driver training located in whole or part in any State, similar to the reciprocity States grant other States' CDL holders who travel across State lines.

Comments. South Carolina, Michigan, Advocates, NADA, CTA and two carriers support CLP reciprocity. CTA and a carrier commented that CLP reciprocity would reduce training and licensing costs and increase flexibility, but also suggested that States be able to issue temporary CLPs to driver-trainees domiciled in other States. OOIDA supports the proposed rule so long as it does not create an additional burden on the States or compromise the one driver/one license/one record principle.

FMCSA Response. The final rule will remain as proposed: States will be required to grant reciprocity to CLPs issued in other States. This will permit a CLP holder to train in States other than his/her State of domicile. FMCSA believes that issuing temporary CLPs to driver-trainees domiciled out-of-State would violate the one driver/one license/one record principle.

6. Minimum Uniform Standards for Issuing a CLP

a. Passing the General Knowledge Test To Obtain a CLP

FMCSA proposed adding new § 383.25 and amending §§ 383.71 and 383.73 to require that every applicant successfully complete the CDL knowledge test before being issued a CLP. A driver who holds a valid non-CDL in his/her State of domicile would obtain a CLP from the State of domicile upon successful completion of a general CDL knowledge test.

Comments. Advocates, two associations, two driver-trainers, a carrier and five States generally supported this proposal.

FMCSA Response. The final rule will remain as proposed with the following clarification: A driver holding a valid CDL who seeks an upgrade for which a skills test is required must also pass the

appropriate knowledge test prior to obtaining a CLP. This is consistent with the new § 383.25(d) which requires a CDL holder seeking an upgrade to his/her CDL to obtain a CLP if the upgrade requires a skills test.

b. Requiring the CLP To Be a Separate Document From the CDL or Non-CDL

FMCSA proposed adding new § 383.25 and amending §§ 383.151 and 383.153 to require that the CLP be a separate document from either the CDL or the non-CDL; contain the words "Commercial Learner's Permit" or "CLP" displayed prominently; and include a statement that it is not valid for driving a CMV unless presented with the underlying CDL or non-CDL.

Comments. Advocates strongly supports the proposal. New York and Alabama commented that there is not enough room for the proposed language on the CLP. Tennessee commented that a two-part license would cause problems with tracking expiration dates, software upgrades and law enforcement officials having to review two documents. Georgia commented that the proposal may not be compatible with REAL ID because a driver may only hold one REAL ID-compliant identification document. Texas suggested having CLP holders surrender their underlying non-CDL documents and requiring States to issue one integrated document that would serve as both a CLP and non-CDL. Washington supports the proposal but notes that it will require changes to its document issuing process.

FMCSA Response. The requirement remains as proposed—that the CLP be a separate document from the underlying license. This rule is not inconsistent with REAL ID because the license and the CLP are not two separate licenses; they are two parts of the same license. As a result, the CLP is not valid unless presented with the underlying license. Furthermore, the two documents share the same driver's license or record number. FMCSA believes that one integrated document would create problems since the CLP and non-CDL would likely have different expiration dates. Tracking expiration dates on separate documents should not present a significant problem because most States appear to do this under the current system. The standard language is necessary so that all parties checking the license (law enforcement, *etc.*) understand the purpose and limitations of the CLP.

c. CLP Document Should Be Tamperproof

In accordance with section 4122 of SAFETEA–LU, FMCSA proposed amending §§ 383.153 and 383.155 to require that CLP documents be tamperproof and that the content of the CLP documents be the same as the content of the CDL documents.

Comments. Georgia and Florida support the proposal. Delaware commented that tamperproofing is expensive and that it is not necessary because the CLP is only used for a short period of time. Michigan described its current system, which pairs a secure underlying license with a paper CLP, as more than adequate and does not believe it is cost-effective to expend resources to tamperproof a temporary document.

FMCSA Response. The tamperproofing requirement, which Congress required in SAFETEA–LU, remains as proposed.

d. Photograph on CLP

FMCSA proposed amending § 383.153 and adding new § 384.227 to require that States include a color photograph or digitized color image of the driver on CLPs.

Comments. Advocates asked FMCSA to provide data or information showing that a photograph or digitized image will substantially deter fraud. Pennsylvania and Michigan do not currently require a photograph on the CLP and object on the grounds that the change would be burdensome. Michigan argued that a photograph on the CLP would be unnecessary if the underlying CDL or non-CDL has a photograph. DHS objected to having a State issue two photograph IDs to a single person, stating that it would violate the one driver/one license/one record principle.

FMCSA Response. After studying these comments and further considering the risk of fraud, FMCSA has decided not only to remove the requirement for a color photo on the CLP document, but also to *prohibit* a photo on the CLP document. FMCSA has determined that eliminating the photo makes the CLP more secure. Otherwise, a State would be issuing a single person two State-issued photo IDs and someone other than the record holder could present the CLP document as a photo ID to establish identity or for other purposes. This change also complies with the spirit and intent of one driver/one license principle: Drivers will not be issued more than one photo ID. The CLP is a two-part license comprised of the CLP document and the underlying CDL or non-CDL *together,* and the CLP document must be presented with the underlying CDL or non-CDL to be valid. The CLP document will have the same driver's license number as the underlying CDL or non-CDL as well as language stating the two-part nature of the document, making this relationship clear.

e. Recording the CLP in CDLIS

FMCSA proposed amending §§ 383.71, 383.73(h), 384.205, 384.206, 284.207, and 384.225 to require States to create a CDLIS record for a CLP and to require States to post all CLP transactions to CDLIS.

Comments. Advocates, Tennessee and Georgia supported the proposal, as did South Carolina, which already complies with the proposal. Delaware objected to the requirement because of additional costs. CTA generally supported the idea behind the proposal but noted that it would be burdensome to the States. Arkansas commented that the proposal would require it to perform CDLIS checks before issuing a CLP, which would result in longer lines and additional expense.

FMCSA Response. The rule's provisions requiring recording the CLP in CDLIS, which Congress required in SAFETEA–LU, remain as proposed.

7. Maximum Initial Validity and Renewal Periods for CLP and CDL

a. Initial Validity and Renewal Periods for a CLP

FMCSA proposed adding new § 383.25 to require that States make the initial CLP valid for 180 days and that they may renew it for an additional 90 days without requiring the CLP holder to retake the general and endorsement knowledge tests.

Comments. NADA and CRST supported the proposal. Florida supported the proposal as long as it does not allow unlimited re-issuance of CLPs where applicants continue to pass the knowledge tests. Michigan requested clarification as to whether an applicant would have to take the knowledge test again to reset the cycle. California, New York, Virginia and the Army commented that the initial period was too short. Oregon, Illinois, Georgia and Wood CC suggested a one-year, initial non-renewable period. Minnesota specifically recommended a 9-month validity period. Advocates and CR England suggested a 90-day initial period with a 90-day renewal period. South Dakota, Georgia and Elgin CC commented that the renewal period was too short. Idaho and Washington supported a 6-month renewal period. The Florence S–D recommended two 6-month renewal periods. Wisconsin complained that the validity cycle was too short. South Carolina objected because it would require a change to existing systems.

FMCSA Response. The FMCSA is making no change to the initial CLP validity period of 180 days but is changing the final rule to allow the CLP to be renewed for an additional 180 days (instead of 90 days) without requiring the CLP holder to retake the general and/or endorsement knowledge tests. This will give CLP holders more time to train and take the CDL skills test, and is generally in line with the majority of the comments, which recommend some combination of initial validity and renewal periods to a maximum of one year. Also, the longer validity period will ease the burden on DMV resources. The number of times a State permits re-issuance of a CLP after an applicant passes the knowledge test is not addressed in this rulemaking and is left to the States' discretion.

b. Initial Validity and Renewal Periods for a CDL

FMCSA proposed amending § 383.73 to establish maximum initial and renewal periods of 8 years for CDLs.

Comments. ATA, AMSA and CRST support this provision. Advocates opposed it on the basis that this period will increase the potential for unsafe drivers to evade detection and magnify the possibility of fraud and the amount of time that fraudulent CDL actions can continue undetected. Missouri commented that because CDL drivers must be medically examined and certified every two years, the disparity between the duration of the CDL and the medical examination could prove to be cumbersome for SDLAs, if the medical certification is ultimately linked to CDL issuance. Georgia and Michigan support the proposal, but suggested that the final rule incorporate REAL ID by reference. Texas recommended that the term be for five years so it matches the CDL expiration date to the TSA Hazardous Materials Endorsement background check requirement.

FMCSA Response. The requirement for maximum issuance and renewal periods of 8 years remains in the final rule. Some commenters misunderstood the proposal: Under the new rule 8 years is the maximum, but States are free to set shorter validity periods. This will affect only a small number of States that currently permit validity periods longer than 8 years. Finally, although FMCSA declines to adopt REAL ID by reference wholly or in part, this provision is consistent with maximum validity periods required by REAL ID.

8. Establish a Minimum Age for CLP

FMCSA proposed amending § 383.71(a) to require that a CLP holder be at least 18 years old, the minimum age to operate a CMV in intrastate commerce. The Agency also proposed to apply the exceptions and exemptions from the age requirements for interstate commerce, granted in §§ 390.3(f) and 391.2 and subpart G of part 391, to the issuance of a CLP.

Comments. ATA and two carriers, a citizen, a driver and a driver trainer supported the proposal. Six States commented that they are already in compliance with the proposed rule. AMSA endorsed the proposal, saying it would help enforce the current age limit on driving of CMVs. Advocates and the Transportation Defense Lawyers Network were concerned that allowing CLPs for driver as young as 18 when they could not drive in interstate commerce until the age of 21 would be used to justify lowering the age of interstate CDL driving. TCA urged FMCSA to develop an experimental program to determine the feasibility of using drivers 18 to 20 years old in interstate commerce. California and Illinois commented that the rule will create hardship in the agricultural community.

FMCSA Response. The proposed requirement remains in the final rule. In the NPRM, FMCSA only proposed setting the minimum age for CLPs at 18. Lowering the minimum age for CDLs is beyond the scope of this rulemaking. For a discussion of the rule's applicability to the agricultural community, please see Section 19.a. below (Applicability to agricultural sector).

9. Preconditions to Taking the CDL Skills Test

a. CLP Prerequisite for CDL

FMCSA proposed adding new § 383.25(d) to require that obtaining a CLP is a precondition to the issuance or upgrade of a CDL.

Comments. Idaho suggested that there should be an exclusion for drivers seeking upgrades or who have previously held CDLs. Delaware recommended that this requirement apply only to those who have never held a CDL. Florida did not oppose the requirement, but commented that it may adversely affect school districts and other organizations from hiring new people. New York and Wisconsin commented that this requirement would entail modifications to State systems. A carrier commented that CLPs are unnecessary, without further explanation.

FMCSA Response. FMCSA has modified the final rule to state that, with respect to upgrades, a CLP is a precondition to the issuance only if the upgrade requires a skills test (as opposed to a knowledge test). Where skills testing is a part of the licensing process, FMCSA believes it is important for drivers to have the opportunity to practice on the public roads in a CMV under the supervision of an experienced driver. FMCSA believes that a CLP is an important document to distinguish between CDL holders and driver-trainees who must be accompanied by CDL holders.

b. CLP Holder Accompanied by CDL Holder

FMCSA proposed adding new § 383.25(a) to require that the CLP holder be accompanied by the holder of a valid CDL with the proper CDL group and endorsement.

Comments. Wisconsin opposes this requirement and commented that permitting unaccompanied CLP holders can facilitate driver training. Advocates does not believe that having a CDL holder accompany a CLP holder provides sufficient assurances of safety because no standards exist for the accompanying CDL holder's driving skills, qualifications or length of time he/she has had his/her CDL.

FMCSA Response. The final rule remains as proposed. Safety considerations outweigh convenience during driver training. FMCSA does not believe that it is safe to permit inexperienced drivers who have not yet passed the CDL skills test to drive unaccompanied. Because qualifications of the accompanying CDL holder were not addressed in the NPRM, they are beyond the scope of this rulemaking.

c. Waiting Period To Take Skills Test

FMCSA proposed adding new § 383.25(e) to require that the CLP holder is not eligible to take the CDL skills test within 30 days of issuance of the CLP.

Comments. Tennessee, Georgia, Michigan and Advocates supported the 30-day waiting period. Twenty-one commenters opposed the 30-day waiting period. ATA and CVTA argued that the 30-day waiting period penalizes driver-trainees who successfully complete their training less than a month after obtaining their CLPs. ATA, NE Agri-Business, and NSTA commented that delaying the skills testing also means that driver training graduates will be forced to postpone their employment and subsequent ability to begin earning wages. It also will be costly for employers, who must either pay the drivers they have trained for not working while they wait to be licensed or risk losing them to another industry. NE Agri-Business and CVTA argued

FMCSA offered no empirical evidence that trainees are better drivers or are better prepared for the skills test after 30 days' practice. Schneider recommended that FMCSA change the waiting period to 14 days, to avoid skills degradation between training and testing. The Joint School District recommended a waiting period of 10 days between taking the written exam and the skills test. Several commenters opposed the 30-day waiting period because classroom training is usually before a student applies for the CLP and, based on the hours in the proposed entry level training rule, the behind the wheel training will take no more than two weeks.

FMCSA Response: FMCSA has amended the provision in the final rule to grant eligibility to take the CDL skills test 14 days after obtaining a CLP. FMCSA understands that some CLP holders may acquire driving skills more quickly than others. Regardless, FMCSA encourages CLP holders to train for as long as necessary to gain sufficient CDL driving skills. However, those who feel ready are eligible, but not required, to take the skills test 14 days after obtaining the CLP. FMCSA does not believe this will compromise safety because only qualified drivers will be able to pass the skills tests given in accordance with the enhanced standards mandated elsewhere in this rule.

d. Relationship to Entry Level Driver Training Rulemaking

On December 17, 2007, FMCSA published a Notice of Proposed Rulemaking addressing Entry Level Driver Training. This proposed rule would require both classroom and behind-the-wheel training for drivers seeking a CDL for the first time.

Comments. Commenters requested clarification about the relationship between this rule and the Entry-Level Driver Training rule.

FMCSA Response. The final rule for Entry Level Driver Training is still under development. While these are separate rules, FMCSA will ensure that any future requirements for driver training are completely compatible with the requirements of this rule.

10. Limit Endorsements on CLP to Passenger (P) Only

FMCSA proposed adding new § 383.25 and amending § 383.93 to require that CLP holders not be eligible for any endorsement other than the passenger (P) endorsement.

Comments. Advocates and CRST support the proposal. A number of entities supported a prohibition on hazardous material endorsements on CLPs but objected to prohibiting other endorsements. Six associations commented that the proposed limit on CLP endorsements would cause delays in providing employees necessary tanker, hazardous material, and school bus training, and would compound the problems the industry has in hiring and keeping full-time CDL employees. CVTA and ATA stated that this prohibition would create problems for drivers who wish to add an endorsement to their license as well as the motor carriers that employ them. They further commented that it would require a costly, time-consuming, two-stage training process and could have an unintended consequence of shifting endorsement training away from more standardized means of instruction such as at driver training schools. A driver trainer commented that the limit on CLP endorsements would make training very difficult. Schneider commented that in its experience, training CLP holders with tanker endorsements produces safer drivers. CR England asked FMCSA to clarify that the prohibition against a CLP driver carrying passengers does not apply to "trainers, trainees and Federal/State Auditors/Inspectors." California commented that drivers should be able to train on the type of vehicle they will eventually be driving. Georgia supports additional endorsements so that drivers could get more behind-the-wheel training. New York, Oregon, and a school district recommended permitting a tanker endorsement. Illinois wants more flexibility in allowing training on tankers and double/triple trailers. Two driver trainers objected to prohibiting training on vehicles requiring endorsements because it sets up a two-step training process. One driver trainer suggested permitting CLP holders to obtain knowledge test endorsements, but that they should not be valid until the driver obtains a full CDL. A number of States had concerns about school bus drivers not being able to train on school buses without an endorsement. New York expressed concern about not having the school bus (S) endorsement on the CLP. The State said the presence of the S endorsement would be proof of the applicant passing the knowledge test before taking the skills test.

FMCSA Response. The final rule includes the following in addition to maintaining the P endorsement FMCSA originally proposed:

A CLP holder may obtain a school bus (S) endorsement with a no-passenger restriction. This change promotes consistency because the P and the S endorsements both require knowledge *and* skills testing. Also, it is logical to permit an S endorsement because it will provide proof that the CLP holder passed the S endorsement knowledge test before taking the S endorsement skills test. The final rule clarifies that the no-passenger restriction on the P and S endorsements does not apply to instructors, examiners, other trainees or Federal/State auditors/inspectors.

A CLP holder may also obtain a tank vehicle (N) endorsement with the restriction that the tanker must be empty and must have been purged if it previously contained hazardous materials. An N endorsement on the CLP with an "empty" restriction balances safety concerns with industry needs to train drivers on the type of vehicles they will eventually be driving, but does not allow them to train under cargo-laden conditions until they have learned the basics of operating the vehicle. By limiting endorsements on the CLP, FMCSA intends for drivers to learn how to operate a CMV safely before taking on more dangerous operations requiring higher skill levels. It is permissible to take the knowledge test for endorsements at the same time as the knowledge test for the CLP, however, the driver must obtain a CDL before driving vehicles requiring endorsements (other than those set forth above).

11. Methods of Administering CDL Tests

FMCSA proposed amending § 383.133 to prohibit the use of interpreters during the administration of the knowledge and skills tests, and to require that applicants be able to understand and respond to verbal commands in English by the skills test examiner.

Comments. South Carolina, New York, Tennessee, Georgia, Alabama, Michigan, Texas, ATA, Advocates, CVTA, CR England, Elgin CC, Driver Holdings, three individuals and two drivers all support the proposal. OOIDA commented that understanding basic commands in English does not sufficiently demonstrate proficiency. Washington requested that FMCSA clarify whether the definition of "interpreter" includes bilingual testers and whether the NPRM proposed that skills testing be conducted in English only. Florida opposed that portion of the proposal that requires that the skills test be given in English only. Although it already prohibits the use of interpreters during skills tests, it permits examiners to interact with applicants in other languages.

FMCSA Response. FMCSA has modified the final rule to make clear that examiners may interact with applicants only in English during the skills test. The OIG's 2002 report on

improving CDL testing and standards noted that some States permit bilingual testers to test in languages other than English, while other States do not permit this practice. Under the final rule this practice is prohibited; bilingual or multilingual examiners are not permitted to test in languages other than English. This clarification is consistent with 49 CFR 391.11(b)(2), which requires drivers to have certain minimum English language skills and will promote national uniformity in testing standards. It is worth noting that § 391.11(b)(2) is currently under Agency review. If the Agency makes changes to § 391.11(b)(2), it may also propose corresponding changes to § 383.133.

12. Update Federal Knowledge and Skills Test Standards

Some modifications to part 383, subparts G and H, were proposed to match the knowledge and skills test standards set forth in the AAMVA 2005 CDL Test System.

Comments. CRST, Advocates, Indiana Rural Electrics, and AMSA were generally supportive of the rule's changes to Federal standards for CDL knowledge and skills testing. AMSA stated that its support was based on the fact that substantial input was taken from those in the affected industry and that the rule would promote uniformity across States.

a. Incorporate by Reference AAMVA 2005 CDL Test System

FMCSA proposed to add new § 383.9 to incorporate the AAMVA 2005 CDL Test System by reference into the Federal regulations for CDL knowledge and skills standards.

Comments. NADA, Florida, Georgia and New York support adopting the 2005 CDL Test System. Georgia and Florida stated that they have already adopted the 2005 CDL Test System. Missouri supported the rule change but suggested that States be able to use paper versions of the tests to accommodate those testing sites that are not computerized. Oregon commented that although the new test system is good, it has limitations and flaws and that AAMVA has been slow to correct errors and issue updates. Oregon further commented on proposed § 383.133(b)(2)(i), which would require the total difficulty level of questions used in each version of a knowledge test to fall within a set range, by asking that AAMVA and FMCSA reconsider the way difficulty levels are used and remove reference to them. Oregon and Idaho both commented that the States should be given limited flexibility to deviate from the Test System. Minnesota suggested that the rule establish the AAMVA Test System as a minimum standard and that FMCSA allow States to alter the test as long as they satisfy this minimum. TCA objected to the new test system on the basis that endorsement of a single test was not necessarily in the interest of highway safety. Virginia, Illinois, California and Nebraska all expressed concern that the new standards would require expansion or reconfiguration of skills testing areas. New York expressed concern that it would not be able to test the required maneuvers in urban areas such as New York City. A community college expressed concern that not all existing testing centers could conform to the new standards, creating an economic hardship on applicants through increased travel costs. South Carolina commented that compliance with the computer generated test requirements would require significant IT solutions and substantial cost.

FMCSA Response. In the final rule, FMCSA does not incorporate by reference the AAMVA 2005 CDL Test System, because doing so would have allowed examinees access to sensitive testing information. As a result, proposed § 383.9 is not included in the final rule. The final rule requires States to use an FMCSA pre-approved State Testing System that meets the minimum requirements established in this rule and that is comparable to the AAMVA 2005 CDL Test System (July 2010 version), which FMCSA approves in this rule. FMCSA will provide all State Driver Licensing Agencies with a copy of the Test System prior to the effective date of this rule. The July 2010 version contains minor, non-substantive revisions to the original (December 2005) version. FMCSA does not believe that the new test standards will be burdensome to the States. In fact, by the end of 2009, approximately 50 percent of States had adopted the 2005 CDL Test System. The 2005 CDL Test System, unmodified, is the appropriate standard to use because it has been rigorously pilot-tested and evaluated for validity and consistency.

States concerned about the challenges of automating the generation of multiple versions of the knowledge test may consider relying on vendors who will make appropriate software available. Even though automated generation is the preferred method, States may nonetheless prepare the tests manually using the algorithm required by the standards.

Although the testing standards for the skills test were upgraded to make performance of off-road maneuvers harder, States do not have to build new sites to test all of the maneuvers. The 2005 CDL Test System provides more flexibility to States in choosing driving skill components than previous versions. Instead they can choose the skills and maneuvers in the testing standards that are appropriate for their current sites, rendering significant reconfiguration or expansion of skills testing sites unnecessary.

States using AAMVA's 2005 CDL Test System (Version July 2010) without modification do not need pre-approval from FMCSA. States seeking pre-approval to use other State Test Systems (including any modification to AAMVA's 2005 CDL Test System (Version July 2010)), must submit a request for approval to FMCSA's CDL Division.

b. Pre-Trip Inspection

In addition, modifications to part 383, subparts G and H, were proposed to make the entire pre-trip inspection (not just the air brake inspection) part of the skills testing standard, rather than the knowledge testing standard as it is currently.

Comments. South Carolina supported making the pre-trip inspection part of the skills testing. Texas and Nebraska opposed making the pre-trip inspection part of the skills testing. Texas commented that administering the pre-trip inspection as a knowledge exam will not reduce safety. Nebraska commented that changing the pre-trip inspection back to a skills test would add 45 minutes to each skills test, thus increasing costs to the State.

FMCSA Response. The pre-trip inspection will remain in the final rule as part of the skills test. The AAMVA 2005 CDL Test System includes the pre-trip inspection as part of the skills test because it is important to demonstrate the applicant's ability to inspect the vehicle for any defects. This should not be a burden to the States, because they now have the option of randomly administering one of three partial pre-trip inspection test options to the applicants, which will reduce the time needed to administer the pre-trip inspection as part of the skills test.

c. Skills Test Banking Prohibition

Modifications to part 383, subparts G and H, were proposed to prohibit the banking of parts of the skills test (for example, an applicant who passes the pre-trip and off-road maneuvers, but fails the on-road part of test must retake all three parts of the skills test).

Comments. North Dakota supported the proposal to prohibit banking. New York said that it does not currently allow banking. However, most

commenters who addressed "test banking" were opposed to the proposed prohibition of this practice. They either stated that FMCSA had not explained the intended safety benefits of the provision or asserted that there would be no safety benefits. Specifically, twelve State agencies objected to this change, arguing that it would lengthen the amount of time it takes to re-test a driver who fails the exam but has passed some portions of the test. States also commented that greater resources will have to be dedicated to skills testing drivers if banking is prohibited due to the increased length of time needed to re-test drivers who fail. Four associations, three carriers and four driver trainers expressed similar concerns. States also commented that the prohibition would increase administrative costs by making it difficult to schedule tests efficiently; requiring greater effort for examining personnel; requiring changes to testing systems, forms and process; and requiring staff retraining.

FMCSA Response. After careful consideration of the many comments, FMCSA has decided to eliminate the proposed banking prohibition. FMCSA has introduced a number of new rules in this proceeding designed to improve the quality of CDL testing. Considering the number of negative comments and concerns about increased costs, the Agency has determined that, at this time, the safety benefits derived from this particular section do not justify States' anticipated costs of compliance. States remain, however, free to prohibit this practice. FMCSA has simply decided not to mandate that States prohibit banking.

d. Gross Vehicle Weight Rating (GVWR) Issues

Modifications to part 383, subparts G and H, were proposed to adopt the expanded definition of CMV in section 4011(a) of TEA–21 to include both "gross vehicle weight rating and gross vehicle weight," "whichever is greater" and "gross combination weight rating and gross combination weight," "whichever is greater."

Comments. Idaho commented that the expanded definition of CMV in section 4011(a) of TEA–21 combines overweight vehicle issues with CDL classifications. Illinois stated that it allows a person legally to register a vehicle for a greater amount than the manufacturer's GVWR/GCWR (the GVWR/GCWR of a vehicle is less than 26,001 pounds, but the plate displayed on the vehicle covers a weight more than 26,000 pounds).

FMCSA Response. The proposed expanded definition of CMV remains in the final rule. The expanded definition of CMV in section 4011(a) of TEA–21 was not intended to allow overweight vehicles with a GVWR/GCWR of less than 26,001 pounds to be used as a representative vehicle for the purpose of taking a CDL skills test. The intent of including the actual gross vehicle weight and the gross combination weight in the expanded definition of CMV is to allow roadside enforcement against drivers who do not have a CDL, but are operating vehicles with an actual weight of more than 26,000 pounds. Therefore, the expanded definition of CMV is to be used for roadside enforcement, but only the GVWR and GCWR must be used for skills testing in order to maintain the representative vehicle concept.

Allowing a person to register a vehicle for a greater amount than the manufacturer's GVWR/GCWR does not affect the expanded definition of CMV. Registered weight has never been a valid way of determining a representative vehicle.

e. Removal of § 383.77 (Substitution of Experience for Skills Tests)

Modifications to part 383, subparts G and H, were proposed to eliminate § 383.77, because the substitute for a driving skills test was intended only for the initial testing cycle prior to April 1, 1992.

Comments. Several commenters, including New York, Florida, CTA, ATA and the Army complained that the proposed change would preclude States from granting the CDL skills test waivers to drivers with military CMV experience. ATA further stated that it is currently working with the Department of Defense to align the military's licensing standards more closely with commercial standards but is concerned that the proposed change would adversely affect the future ability of military CMV drivers to transition to a commercial setting. ATA and New York recommended keeping the CDL skills test waiver for holders of military driver's licenses with CMV experience.

FMCSA Response. The final rule amends § 383.77 to limit the substitution of experience for the skills test to eligible drivers with military CMV experience. The skills test waiver provision in § 383.77 was promulgated in 1988 as a temporary "grandfathering" transition measure when FMCSA first adopted CDL regulations. Although this provision has been associated with fraudulent activities, including the falsification of documents to prove that the applicant has the experience and clean driving record necessary to qualify for the waiver, FMCSA believes this provision serves an important function for military personnel returning to the civilian work force. Limiting this provision to drivers who have military CMV experience should significantly reduce the fraudulent activities associated with this provision. Regardless, FMCSA continues to encourage military units to train their recruits as CMV drivers and have them obtain State-issued CDLs while still in active duty status to minimize any adverse effect on their future ability to transition to the civilian workforce. FMCSA will continue to work with the armed services to identify other ways to facilitate military drivers getting CDLs.

f. Covert Monitoring of State and Third Party Skills Test Examiners

Modifications to part 383, subparts G and H, were also proposed to adopt the OIG recommendation to require covert monitoring of State and third party skills test examiners.

Comments. Missouri supported the proposal and recommended that federal funding be made available for implementation. Driver Holdings supported the proposal so long as the objective is to detect fraud, not mistakes or errors in judgment. Michigan complained that the proposal would increase State employees' work load significantly. Virginia commented that unannounced or covert monitoring is logistically difficult and burdensome—without advance notice, the necessary or appropriate people or documentation may not be available. The Army wants to have its CDL program certified in the future, and does not believe that covert monitoring can be conducted under current military installation and security requirements. South Carolina commented that it currently engages in covert monitoring of State employees. North Dakota does not think it should have to engage in covert monitoring of its own employees. Florida commented that the proposals are generally consistent with its programs, but that it finds announced visits more efficient than unannounced visits because, with the latter, key personnel can be unavailable. CTA commented that retesting a sample of drivers previously tested by a third party is burdensome. Several States object to all the monitoring being required and want funding from FMCSA.

FMCSA Response. As proposed, covert monitoring of State and third party skills test examiners will remain in the final rule. In addition to the covert and overt monitoring of State and third party skills test examiners required at § 384.229(b), § 383.75(a)(5) requires States to perform one of the

three alternative skills test exercises (covert test taking, co-scoring, and retesting) on third party examiners. FMCSA has determined that increased monitoring of State and third party skills test examiners' records and administration of skills tests, using both covert and overt methods, is an important part of both fraud prevention and quality control. Fraud prevention and quality control are, in turn, critical to achieving the goal of national uniformity in testing standards. Furthermore, the Agency adopts these monitoring requirements in accordance with the OIG's recommendation in its 2002 Report that it require covert monitoring of State and third party skills test examiners. FMCSA does not believe that these requirements are unreasonably burdensome. Although States may experience some inconveniences in the short term as they adjust their programs, FMCSA's goal is to improve the quality of testing standards over the long-term.

13. New Standardized Endorsements and Restriction Codes

a. Uniform Endorsement Codes

FMCSA proposed to amend § 383.153 to include uniform codes for all endorsements and restrictions on CDLs.

Comments. Tennessee, Georgia, NADA, two carriers and a trainer supported the proposal. Wisconsin stated that this change would require legislation and a reconfiguration of the DMV's driver license data processing system. Virginia commented that it would require modifications to the DMV's automated system and was concerned it would require immediate reissuance of all CDLs. Delaware stated that this would be burdensome and commented that if a phased approach is acceptable to the FMCSA (change the license upon renewal), there will be some CDL holders who have the new endorsements and restrictions and others who have the old ones. If not, the DMV will have difficulty handling the volume of customers who would be required, within a limited time-frame, to have their licenses changed. Florida commented that the adoption of the new codes would be prohibitively expensive and that several of the proposed standard restriction codes are already in use for other purposes, while some of the proposed restrictions are represented by other codes. Florida and Minnesota suggested that the rule require CDLs to display explanations for the codes. New York commented that it would have to change its codes and that it would be burdensome. North Dakota and Illinois found the wording of the restrictions confusing in that some are restrictions and others are endorsements. Pennsylvania commented that current regulations are adequate. Michigan opposed the new codes because of the cost of implementation. Texas supported the proposal generally, but suggested that FMCSA establish a working group consisting of representatives from all States and jurisdictions, including AAMVA, to review this proposal and make a final recommendation on standardizing these codes to minimize the impact all States.

FMCSA Response. The proposed changes remain in the final rule with minor modifications to clarify that the L, Z, E, O, M and N codes are restrictions, not endorsements. These comments demonstrate the need for standardizing the codes: States are using many inconsistent codes and have not, in many cases, followed the existing codes assigned by AAMVA. It is essential to have the new standardized codes on the licenses so that law enforcement officials across State lines can determine whether drivers have proper qualifications. FMCSA will not require CDLs with old codes to be reissued; the new codes will be used when the license is next renewed or reissued. FMCSA recognizes that during the transition period, law enforcement officials may encounter multiple sets of endorsement and restriction codes. However, this is no different than what is currently happening when CDL holders cross State lines. In the long term, the rule will correct this problem and promote national uniformity. An Agency outreach campaign to coincide with implementation should alleviate many of the States' concerns about the transition to the new codes.

FMCSA disagrees that standardizing restriction codes will be prohibitively expensive. This rule does not require States to add endorsements or restrictions to their database or license. It only requires them to standardize the letter codes associated with the endorsements or restrictions they currently use. Thus, in some cases, States will have to replace one letter with another on the CDL license and in their SDLA data code. However, this is primarily a computer programming change limited to reassigning letter codes and should not result in the need to redesign CDL documents significantly. While the States will be required to adopt three new restriction codes, the majority of the mandated restriction codes in this final rule are the existing standardized national restriction codes that AAMVA adopted many years ago. These standardized codes were created by AAMVA so States would have uniform codes if they needed to use them as part of their licensing program. For those States that currently enforce these restrictions, but chose to use non-standardized codes, there will be a short-term burden in converting to the standardized codes. In the long run, it will benefit the CDL program by having all States use standardized codes for national restrictions.

b. Testing Drivers on Vehicles With Air Brakes, Automatic Transmissions, and Non-Fifth Wheel Combination Vehicles

FMCSA proposed to amend the Federal restrictions at §§ 383.5, 383.93, 383.95, and 383.153 for applicants who use a vehicle in the skills test that is equipped with (1) an automatic transmission; (2) air over hydraulic brakes; or (3) a trailer with a non-fifth wheel (pintle hook) connection. All three restrictions would be assigned standardized restriction codes, along with a standardized code for the current air brake restriction.

Comments. Florida and South Carolina support the proposal. Pennsylvania questioned whether current CDL holders who do not have the new restrictions or endorsements would be grandfathered. Idaho commented that the new restrictions are unnecessary, costly and burdensome on the driver and was concerned about there being enough room on the CDL for the increasing number of restrictions. Oregon supported the automatic transmission restriction but, with respect to the other new restrictions, believes that regulatory objectives would be better served by establishing standard restrictions for small Class A CMVs. A carrier asked whether it would have to bring several trucks to the tests to gain all of the needed endorsements.

FMCSA Response. The proposed new standardized endorsements and restrictions remain unchanged in the final rule. A CDL applicant will be licensed with restrictions based on the type of vehicle and equipment he/she uses for the skills test. FMCSA believes that it is an important safety objective to require applicants to demonstrate their ability to operate the vehicles and equipment covered by this section prior to licensure.

Beginning 3 years after the effective date of this final rule, current CLP and CDL holders who do not have the standardized endorsement and restriction codes, and applicants for a CLP or CDL, are to be issued CLPs and CDLs with the standardized codes upon initial issuance, renewal, upgrade or transfer.

Current CDL holders will not be required to be retested to determine whether they need any of the new restrictions for no full air brakes, no manual transmission and no tractor-trailer. They are, in effect, grandfathered from this requirement. These new restrictions only apply to CDL applicants who take skills tests beginning 3 years after the effective date of this final rule (even if those applicants previously held a CDL before the new restrictions went into effect).

c. Automatic Transmission Restriction

FMCSA proposed amending §§ 383.95 and 383.153 to require a restriction on applicants who use a vehicle in the skills test that is equipped with an automatic transmission.

Comments. Florida, Oregon and South Carolina support the proposal. CRST generally supports the entire standardized endorsement proposal. However, Idaho commented that the automatic transmission restriction was unnecessary, costly and burdensome and that employers are in the best position to determine a driver's proficiency on manual transmissions. Farris Brothers does not think the restriction is necessary. North Dakota found the proposed language confusing.

FMCSA Response. To clarify how the automatic transmission restriction will be applied, the final rule includes a definition for "manual transmission" in § 383.5. This definition will clarify what constitutes a manual transmission and promote national uniformity in the application of this restriction. It will promote highway safety by only allowing qualified drivers to operate CMVs with manual transmissions. A CDL holder with the automatic transmission restriction is restricted from driving any class CMV with a manual transmission.

d. Definition of Tank Vehicle

FMCSA proposed to amend § 383.5 to set an aggregate rated capacity threshold of 1,000 or more gallons for all tanks (permanent and portable) before a driver would need a tank endorsement.

Comments. Advocates strongly opposed this change. It commented that FMCSA did not adequately justify this change, indicating that it believed that this change would exempt CMV operators from the tank endorsement requirement when transporting certain hazardous materials of less than 1,000 gallons. Oregon supports the change for tank vehicles, but suggested changing the threshold to 500 gallons. CVSA supports the change for tank vehicles and the clarification that the tank capacity threshold for needing a tank vehicle endorsement should be the aggregate capacity of tanks being transported.

FMCSA Response. While the proposed amendment setting a 1,000 gallon aggregate capacity threshold will remain in the final rule, there is also a need to retain a minimum individual rated tank capacity for the purpose of determining the aggregate capacity of the vehicle carrying multiple tanks. In the current definition of tank vehicle, reference is made to cargo tanks and portable tanks as defined in 49 CFR 171. Both of these types of tanks are defined as "bulk packaging" which is further defined in part 171 as having a capacity greater than 119 gallons. Therefore, only tanks being transported with a rated capacity greater than 119 gallons will be considered for the purpose of determining the aggregate capacity threshold for needing a tank vehicle endorsement,

The requirement for an endorsement for tank vehicles designed to transport 1,000 gallons or more is separate from the hazardous materials requirements. This rule does not affect any pre-existing hazardous material restrictions that might apply.

14. Previous Driving Offenses by CLP Holders and CLP Applicants

FMCSA proposed amending §§ 383.5; 383.51; 383.71; and 383.73 to subject a CLP holder and CLP applicant to the same disqualification requirements as a CDL holder and CDL applicant.

Comments. Michigan, Georgia, Texas, Advocates, ATA, AMSA and a training school commented that they had no objection. Texas also suggested that the proposed rule add drug offenses and certain felonies committed by CDL holders in non-CMVs to the list of offenses for which the States must disqualify persons from operating CMVs, as well as impose a lifetime disqualification for persons convicted of an offense under 8 U.S.C. 1323 and 1324 related to the transportation of undocumented aliens. Although not opposed to the basic requirements of the proposed regulations, Tennessee requested clarification of several issues. Tennessee asked specifically if a person with disqualifying offenses in his/her history would be able to obtain a CLP, or if he/she would be required to serve out the disqualification prior to training on a CMV. Delaware stated that the Agency should not force States to take action on a driver before he/she has full CDL privileges and that a driver should be removed from CDLIS if he/she does not convert the CLP to a CDL. Oregon commented that full implementation will require statutory revision, administrative rule revision and numerous procedural revisions, and will place additional stress on limited programming resources that are already fully dedicated to projects to comply with current and projected Federal regulations. Oregon also questions whether CDLIS is capable of handling the CLP holder information. Idaho opposed not permitting CLP holders to train during the disqualification period. California commented that it would be difficult to impose disqualifications on CLP holders. California currently has no reliable method of determining whether a driver cited for offenses on a non-CDL is a CLP holder for purposes of disqualification. The State would have to undertake major programming changes to its citation and conviction procedures to accommodate the rule change. New York commented that it already disqualifies CLP holders for certain non-CMV violations, but that implementing the proposed rule would require legislative changes. CVTA opposes the rule change because various States treat moving violations involving a non-CDL license in different ways, and the rules for license suspensions vary. CVTA also commented that the rule would impose a retrospective evaluation of CLP applicants' records that is not consistent with the manner in which SDLAs handle licensing actions. CRST commented that States would not be willing to assume the additional responsibility of performing background checks.

FMCSA Response. The proposed CLP disqualification provisions remain in the final rule. CLP holders and applicants, like CDL holders and applicants, are authorized to drive on public roads. FMCSA believes that this rule implements an important safety objective that justifies changes to existing State programs. FMCSA does not believe that CLP holders and applicants, who generally have less driving experience, should be subjected to lower standards than the generally more experienced CDL holders and applicants. As for the issue raised by Tennessee, the answer is that a person disqualified from operating either a non-CMV or a CMV at the time he/she applies for a CLP would be required to serve out that disqualification period before receiving a CLP. Because the CLP is a two-part license, the underlying non-CDL or CDL must be valid at the time the CLP is issued and remain valid in order for the CLP to be valid. With regard to Delaware's comment, a driver with an expired CLP that is not converted to a CDL can be removed from CDLIS if there are no convictions

for a disqualifying offense under 49 CFR 383.51. If there are disqualifying convictions, the rules for retaining these convictions must be followed before removal of the driver from CDLIS.

The purpose of this rule is simply to extend the pre-existing list of CDL disqualification offenses to CLP holders. Because the NPRM did not contemplate expanding the list of disqualifying offenses, such measures are beyond the scope of this rulemaking.

15. Motor Carrier Prohibitions

FMCSA proposed amending § 383.37 and appendix B to part 385 to include a specific prohibition against motor carriers using drivers who do not have a current CLP or CDL or who do not have a CDL with the proper class or endorsements, or using a driver to operate a CMV in violation of a restriction on the driver's CDL.

Comments. Georgia, Michigan, Advocates, CRST, NADA and a community college supported the proposal. AMSA, ATA and CR England opposed the assessment of an "acute violation" under the Safety Rating Process for violations of proposed § 383.37 unless the Agency takes into account the number of such violations as compared against the number of drivers in a fleet. Otherwise, larger carriers could be unfairly penalized on a proportional or violation-per-driver basis. CR England and CTA commented that the Agency should implement a program to notify a motor carrier when a license has been suspended, downgraded, or otherwise adjusted.

FMCSA Response. The proposed changes remain in the final rule. Motor carriers of all sizes bear the same responsibility for ensuring that all drivers are qualified to operate CMVs. Even one unlicensed or disqualified driver on the roads can present a serious risk to safety. Carriers are in the best position to determine that their own drivers are properly licensed. Implementation of a central database for monitoring and notifying carriers of status changes to CDL holders is beyond the scope of this rulemaking.

16. Incorporate CLP-Related Regulatory Guidance Into Regulatory Text

FMCSA proposed codifying regulatory guidance related to this rulemaking and eliminating regulatory guidance made obsolete by the changes in this rulemaking. This includes regulatory guidance under § 383.23 (CLP), questions 1, 2, and 4; part 383, Subparts G and H, all questions (knowledge and skills testing); and § 383.153, questions 1–7 (CLP and CDL documents). FMCSA proposed to amend §§ 383.25, 383.73, 383.77, 383.95, 383.113, 383.131, 383.133 and 383.153.

Comments. Elgin CC supports the proposal. Michigan and Georgia support the proposal so long as the Agency gives opportunity for comment. Advocates complained that there was not adequate explanation of why certain interpretations were slated for either incorporation into the rule text or deletion.

FMCSA Response. The regulatory guidance proposed to be eliminated as obsolete in the NPRM will be eliminated without change in the final rule. In the NPRM, the Agency proposed a number of rule changes and solicited public comment. The regulatory guidance that will be codified in the final rule was explained as part of the rule changes in the NPRM. When these changes are implemented, some previously issued interpretive statements will no longer be appropriate because (a) they will repeat what is newly incorporated in the regulatory text, or (b) the new rules will create changes to the CDL program that render the old guidance inaccurate. Thus, having already given notice and opportunity for comment on the substantive issues as a part of this rulemaking proceeding as well as identifying the interpretive statements that would be affected by the rule, the Agency does not believe that further notice or opportunity for comment on rescinding redundant or obsolete guidance is necessary.

The Agency inadvertently omitted from the NPRM additional regulatory guidance that will be rendered redundant and obsolete by the final rule. That guidance includes the following interpretations: Question 11, interpreting § 383.73 and Questions 2 and 3, interpreting § 383.95. In the NPRM, the Agency proposed incorporating the substance of Question 11, interpreting § 383.73 into § 383.73(i), but inadvertently omitted it from the list of interpretations that would be rendered redundant by this rule. In addition, the Agency proposed changes to § 383.95 that render questions 2 and 3 obsolete, but inadvertently omitted that guidance from the list of interpretations that would be eliminated as obsolete. To avoid any confusion, the Agency will eliminate these interpretations in addition to those identified in the NPRM.

17. Incorporate Safe Port Act Provisions

In response to the requirements of the SAFE Port Act, FMCSA proposed to amend §§ 383.73 and 383.75, and to add §§ 384.227, 384.228, and 384.229.

a. CDLs Obtained Through Fraud

FMCSA proposed in § 383.73(k) that States be required to cancel or revoke a CDL if the holder has been convicted of fraud related to the CDL application or testing process. In addition, where States receive credible information that a CLP or CDL holder is suspected, but not convicted, of fraud related to the issuance of his/her CLP or CDL, the State must require the driver to be re-tested within 30 days.

Comments. Oregon commented that the term "suspend" is more appropriate than "cancel or revoke." California commented that the term "cancellation" was not sufficiently punitive where fraud is suspected. California also commented that each State should have the flexibility to investigate suspected fraud according to the circumstances and that the 30-day re-testing time frame was overly restrictive. Illinois requested a definition of "fraud," "convicted" and "credible information." Michigan requested that the rule be revised so that States must act within 30 days of *notification* of a conviction of fraud.

FMCSA Response. In the final rule, FMCSA will remove the terms "cancel" and "revoke" and replace them with "disqualify." This change is consistent with other parts of the rule: part 383 defines "disqualification" to include, among other things, the suspension, revocation or cancellation of a CLP or CDL. FMCSA believes that this change will give States the flexibility to manage their programs within the parameters of their existing rules.

In addition, instead of requiring that States re-test drivers suspected of fraud within 30 days, the final rule will require the CLP or CDL holder, within 30 days of being notified to re-test, to make an appointment for and take the test at the next available appointment or testing time. This will give States as well as drivers more flexibility to schedule re-testing. New § 383.73(k)(1) requires States to "have policies in effect which result * * * in the disqualification of the CLP or CDL of a person who has been convicted of fraud * * *" The new rules require States to develop policies, but do not specify that the disqualification take place within 30 days of the conviction. Finally, FMCSA declines to create a special definition of "fraud," "convicted" or "credible information."

b. Computer System Controls—Supervisor Involvement

FMCSA proposed to amend § 383.73(m) to require that only supervisory level personnel may continue the CDL or CLP issuance

process when driver record checks return suspect results.

Comments. Idaho commented that this requirement is a burden on management staff, and that there is no guarantee that fraud or errors would be eliminated. Oregon commented that implementation would present significant programming challenges and costs. Oregon also commented that supervisory personnel may not always be available and that this proposal exceeds the intent of the OIG's 2006 Report. Wisconsin commented that, under its current system, its non-supervisory employees are well-trained on how to handle suspect results. Nebraska commented that it has fifteen one-person exam offices and 81 multiple-person offices that do not have full-time supervisory personnel on site full-time. Michigan currently has a two-tiered process that sends all suspect results to a separate group of subject matter experts located in a separate facility, but noted that they are not, technically, supervisory staff. Although Michigan supports the concept of the proposed amendment, it believes that its current system achieves the intended objective.

FMCSA Response. In the final rule, FMCSA renumbers this section to be § 383.73(n)(2). In addition, in response to comments, FMCSA changes this section to require each State to demonstrate that it has a plan to prevent and detect fraud when a driver record check returns suspect results. FMCSA takes fraud prevention and detection seriously and the intent behind the proposed change was for all States to improve their standards for fraud prevention and detection. However, FMCSA recognizes that many States have developed anti-fraud measures tailored to their own systems and that they may combat fraud as well as or better than the proposed change. This change allows States more flexibility in implementing improved anti-fraud measures.

c. Background Checks

FMCSA proposed adding new § 384.228 to require background checks on all State and third party CDL examiners.

Comments. Florida commented that this would increase costs without corresponding benefit. Oregon questioned whether the proposed rule applied to both skills and knowledge test examiners. If it applies to both, Oregon commented, this would increase costs. Wisconsin commented that it "fails" examiners with felony convictions only within the past four years, not ten years as proposed in the rule. Delaware opposes background checks of staff members with long, credible histories of government service and requested a grandfathering provision. Missouri questioned whether the proposal requires a nationwide or a State-wide background check. For the former, Missouri commented that States may vary in the way they define felony and fraudulent activity convictions. Missouri further requested special consideration for employees who report their convictions in a timely manner. Alabama requested information on what constitutes failure of a background check. Illinois questioned whether the background check is required to be a fingerprint- or a name-based check and commented that a fingerprint-based check should be considered sufficient. Minnesota currently conducts background checks at the time of hiring and requested that the costs of administering the rule be evaluated. Michigan requested an exemption if the state has a criminal history monitoring system that provides the regulatory agencies with the desired information on a more timely basis.

FMCSA Response. The proposed background check requirement will remain in the final rule. This requirement applies to all test examiners, including both skills and knowledge test examiners. It also leaves the criteria and methods for the criminal background check to the States' discretion, so long as they include the minimum criteria set forth at § 384.228(j)(2). However, as § 383.228(j) clearly contemplates decertifying examiners who fail the test, it does not create any exemption for current examiners. Similarly, the rule prohibits certification (and requires decertification) of examiners with any conviction involving fraudulent activities or *any* felony conviction within the past ten years. Since no exception is made for convictions received out-of-State, States are required to conduct nationwide criminal background checks. Finally, this rule sets *minimum* standards for background checks. States are free to implement systems that provide criminal background checks on a continuing or more frequent basis than required under this rule.

As stated above, FMCSA takes fraud prevention and detection seriously. At approximately $60 per background check, FMCSA acknowledges that these changes may impose additional financial requirements on the States in the short term. However, these changes are important to the implementation of uniform national standards proposed in this rulemaking docket.

d. Training Requirements for Knowledge and Skills Examiners

FMCSA proposed adding new § 384.228 to require mandatory training standards for all CDL knowledge and skills test examiners.

Comments. Oregon strongly opposes requiring knowledge examiners to undergo the proposed training standards. Missouri commented that knowledge and skills examiners require different training and requested federal funding to cover costs. Oregon, Missouri and IUOE noted that proposed § 384.228(d) requires refresher training every four years, but proposed § 384.228(h)(1) appears to require it annually. IUOE also commented that the training standards could cause significant delays in the administration of CDL examinations. Florida commented that refresher training every four years would increase both the costs and the complexity of administering the CDL program without a corresponding benefit. California supports strengthening the certification and training requirements, but feels the proposed rules are overly prescriptive. New York suggested requiring refresher training every two years instead of annually. Alabama asked the Agency to clarify how many hours of training are required. Michigan generally opposes the requirement and commented that States should be free to set their own standards. B–J School Buses opposes the requirement as unnecessary.

FMCSA Response. In the final rule, FMCSA establishes separate training standards for CDL knowledge test examiners and skills test examiners. Examiners that *only* administer standardized knowledge tests do not need extensive CDL skills test training. The previously proposed paragraphs (b)(1), (2), and (4) through (6) of § 384.228, have been redesignated as § 384.228(d), which now applies to skills test examiners. The previously proposed paragraphs (b)(1) through (3) of § 384.228, have been redesignated as § 384.228(c), which now applies to examiners who administer the knowledge test only. This change will allow for a more efficient allocation of State resources. In addition, FMCSA has corrected the discrepancy between proposed §§ 384.228(d) and 384.228(h)(1) by amending § 383.228(f) to reflect that refresher training is required once every four years.

A number of changes in this rule are intended to promote national uniformity. In order to achieve that goal, all States must achieve consistent standards. Ensuring the continued qualifications of knowledge and skills

test examiners is a critical part of achieving uniform national standards. Although certain States may experience some additional burdens in the short-term, FMCSA's goal is to improve the quality of testing standards over the long-term.

e. Minimum Number of Tests Conducted (Minimum Skills Tests for Testers and Examiners)

FMCSA proposed adding new § 384.228 to require that each company (tester) with a contract to perform third party testing would be decertified if it did not conduct at least 50 skills test examinations per calendar year and that each individual examiner's authority would be revoked if he/she did not conduct at least 10 skills test examinations per year.

Comments. Michigan agrees that testers and examiners should be required to conduct a minimum number of tests per year, but thinks that each State should be able to set its own standards. Ten States commented that the proposed requirement would be very difficult to achieve, potentially putting third party testers out of business and increasing the burden on State testers. Most of the 10 States recognize the need to maintain skills, but do not support these minimum requirements. Oregon, Oklahoma and Minnesota objected to annual examination minimums for testers, but do not object to minimums for individual examiners. Wisconsin comments that its examiners are currently required to perform at least 12 tests per year, but that many testers cannot meet the 50-test minimum. South Carolina objected to the 10-test minimum because it has an annual evaluation system for examiners to make sure examiners maintain skills. Nebraska commented that a significant number of its testers and examiners would not be able to meet the minimums. Florida prefers its own system which requires a minimum of one test for testers and six for examiners. California objected to the focus on quantitative as opposed to qualitative qualifications. Missouri, three school districts, one school bus company and NTSA were concerned that the proposed rule would affect school districts or school bus contractors that test only their own employees. IUOE complained that the proposed rule does not take into account the diversity of circumstances across regions and industries.

FMCSA Response. After considering these comments, FMCSA has made the following changes to the final rule: (a) Examiners who do not meet the 10-test minimum must either take refresher training or have a State examiner ride along to observe the third party examiner administer a skills test in order to maintain certification; and (b) the 50 tests per year minimum for testers is eliminated. The final rule will thus focus on the examiners' skills, which is the intent of the rule, and will not penalize small third party testers. It also provides an alternative for small, rural or in-house examiners who conduct fewer than 10 tests per year.

f. Third Party Testing (Annual Inspection; Advance Scheduling of Tests; Separation of Training and Testing Functions)

FMCSA proposed amending § 383.75 to require States to conduct an annual on-site inspection of each third party test site and to require that each third party tester submit a weekly schedule of skills test appointments no later than the last business day of the prior week.

Comments. Schneider generally supports the proposed rule. With respect to the annual inspection requirement, Oregon and Michigan objected to an annual inspection of every site at which third party testers administer skills tests, saying that this would be burdensome.

Five States commented on the submission of weekly schedules. All had concerns over the additional administrative and logistical burden that this requirement would create. Oregon, California, two carriers, two associations and an advocacy group all objected to the requirement that third party testers submit their schedules to the State a week in advance, on the grounds that it does not provide sufficient flexibility for scheduling. Minnesota commented that the proposed requirement is not compatible with the existing system, would interfere with its ability to plan its testing schedule efficiently and would require administrative rules for implementation. Nebraska commented that many drivers cannot schedule their tests a week in advance and that the proposed rule would place a burden on state examiners, shifting applicants away from third party testers. Florida complained that it would increase its administrative burden unnecessarily because it already has an effective fraud detection program and does not need any advance notice of test scheduling.

Oregon and OOIDA recommended prohibiting third party testers (for example, commercial driver training schools) from testing CDL applicants trained by that tester.

FMCSA Response. In consideration of these comments, FMCSA has made the following changes to the final rule:

Each third party tester (not testing site) is required to be inspected once every two years. Annual inspection of every testing site would be impractical and overly burdensome because many third party testers administer skills tests at a variety of different sites. Also, some third party testers may not have tests scheduled regularly throughout the year, making it difficult to schedule annual inspections.

Each third party tester must submit a schedule of CDL skills test appointments no later than two business days in advance of administering the test. Many testing sites do not have their weekly schedules fixed by the end of the prior week, so a two-business-day notification will give third party testers more flexibility in scheduling tests.

Third party skills examiners are prohibited from administering skills tests to applicants they skill-train. A conflict of interest may arise when a trainer at a commercial training school is also a State-certified skills test examiner. In order to reduce both the opportunity for fraud and unintended bias in skills testing, the rule prohibits third party skills testers from administering skills tests to applicants their training school skill-trains. However, FMCSA has provided an exception to this prohibition when the nearest alternative third party tester or State skills testing facility is over 50 miles from the training school.

g. Third Party Bond Requirements

FMCSA proposed to amend § 383.75 to require that third party testers maintain bonds in an amount sufficient to pay for re-testing drivers in the event the examiners are involved in fraudulent activities related to skills testing.

Comments. South Carolina commented that it evaluates its third party testers extensively, and that the additional bond requirement may drive participants from the program. Florida currently has a bond requirement that covers reimbursement to the State and to individual drivers and is concerned that the language of the rule restricts it from reimbursing individual drivers. California recommended that the regulations provide an exemption from the bond requirement for governmental or quasi-government agencies such as public utilities and transit authorities that participate in a State's third party testing program. Illinois commented that the bond requirement would be burdensome in the current economic environment and may cause a reduction

in the number of third parties that participate in its program. IUOE opposes the requirement and commented that FMCSA has not provided any evidence that fraud is a problem in third party testing.

FMCSA Response. The bond requirement remains as proposed in the final rule. FMCSA is aware of a number of third party testers whose examiners have been engaging in fraudulent activities. As a result, a number of CDL holders were required to be re-tested, causing States and individuals to incur additional expenses. The bond requirement will provide States and individuals an opportunity to recoup these expenses. This requirement does not prohibit States from providing for recovery of costs for individual drivers. Finally, if a tester is properly characterized as a third party examiner, as opposed to a State examiner, this requirement applies nevertheless.

18. Other Issues Related to Fraud Prevention

a. Black and White Photograph

FMCSA proposed amending § 383.153 and adding new § 384.227 to require that the photograph or digitized image that is placed on the CDL and now recorded as a part of the driver history continue to be captured in color.

Comments. Virginia wants to use black and white laser engraved technology and claims it is equally as secure or more secure than color photographs or digital images.

FMCSA Response. The final rule permits black and white laser engraved images in addition to color photographs and digital images. Today's black and white laser engraved technology is just as secure against alteration as color photography or digital images, and perhaps more secure. Further, in the REAL ID rule published on January 29, 2008, DHS approved black and white laser engraved technology as an alternative to color photographs. FMCSA has already acknowledged the acceptability of black and white laser engraved images by granting Virginia a two-year exemption from the prohibition on using black and white laser engraved images on March 9, 2009, and by permitting it to use such photos in lieu of color photographs on CDLs.

b. Check Photograph on File

FMCSA proposed adding new § 384.227 to require that States record the digital color image or photograph that is captured as a part of the application process and include it as a part of the driver history. FMCSA also proposed that States be required to check the photograph or digital image they must maintain on file for every CDL or CLP holder against the applicant in person whenever the CDL or CLP is renewed, upgraded or transferred and when a duplicate is issued.

Comments. Missouri commented that retaining a digital photo of every CLP and CDL applicant could result in increased costs. California objected to comparing the applicant's photo to the person because it would require the applicant to appear in person at the field office and would eliminate the option of processing a CDL renewal application by mail or Internet.

FMCSA Response. FMCSA has decided that the final rule will require States to check the photograph on file against the applicant in person only when the applicant appears in person. This will allow for processing by mail, and will lessen the burden of compliance on the States. The final rule will include the requirement that a digital color image or photograph or black and white laser engraved photograph be kept on file. FMCSA believes that this is an important measure to combat fraud. However, in accordance with § 383.153(b)(1) of the final rule, which prohibits States from placing a photo or other image on the CLP, States will not be required to capture a photograph, digital image or other representation of the applicant during the CLP application process. Instead, States are required to check the photograph or digital image on record against the CLP applicant when he/she appears in person. To the extent that there is no photograph or digital image on record to make sure the person on the license and the applicant are the same, States are to check the photograph or image on the base-license against the CLP applicant when he/she appears in person.

c. Two Staff Members Verify Test Scores and Other Documents

FMCSA proposed amending § 383.73(m) to require that two DMV staff members verify CLP and CDL applicants' test scores and completed application forms and documents to prove legal presence.

Comments. Delaware, Nebraska, North Dakota, Tennessee, Texas, Washington, Wisconsin and South Dakota all made similar comments complaining that the proposed change would be time-consuming and expensive and would disrupt current licensing systems in remote areas, resulting in closures of SDLA offices or other inconveniences for States and drivers. Texas also commented that FMCSA should give States the discretion to conduct documentation reviews either before or after issuance of the license. Michigan complained that the proposal was vague and unmanageable, without further explanation. Farris Brothers expressed concern about the impact of the proposed rule on rural communities.

FMCSA Response. In the final rule the FMCSA has provided an exception for DMV offices with only one staff member on duty. In such cases the documents must be verified by a supervisor before issuance or, when the supervisor is not available, copies must be made of the documents used to prove legal presence and domicile for a supervisor to verify along with the completed application form within one business day of issuance of a CLP or CDL. This change will provide protection against the risk of applicants presenting fraudulent documents, without affecting States' ability to maintain one-person satellite DMV offices to serve applicants in remote locations. This provision may involve some costs to States by increasing the amount of time and resources required to process CDLs. The requirement does not mean that two SDLA employees must each go through the entire CDL issuance process for a particular driver-applicant. For example, one person might review the legal presence and other documentation the driver presents, while a second SDLA employee would conduct the required driving record check for driving violations, take the applicant's photograph and issue the license. This splitting of driver processing may take additional time, but it will not double either the time or effort needed to issue a CDL.

19. Miscellaneous Comments

a. Applicability to Agricultural Sector

Comments. Several commenters raised questions about the rule's applicability to the agricultural segment of the industry. Five agricultural entities asked for an agricultural exemption from the rule.

FMCSA Response. Many agricultural operations are exempt from the current CDL regulations, as well as the proposed rule. This rule does not affect any of these current agricultural exemptions. The request by farm suppliers for exemption from all CDL rules is beyond the scope of the NPRM.

b. Relation to REAL ID

Comments. New York commented that it has not decided whether to implement REAL ID and objects to any requirement that would force the State to do so through its CDL program.

California, Pennsylvania and Missouri commented that if FMCSA adopted REAL ID as a standard for the CDL program, it would essentially convert a voluntary Federal program into a mandatory one. Texas commented that if FMCSA ties its CDL rules to REAL ID, States that decide not to adopt REAL ID will refuse to comply with CDL rules. Conversely, Michigan encourages FMCSA to link the two rules.

FMCSA Response. FMCSA expressly declines to require States to adopt REAL ID in whole or in part. However, FMCSA has taken care not to implement any rules that conflict with REAL ID. Where FMCSA has implemented certain elements of the CDL program that contain provisions similar or identical to those of REAL ID, it does so on an independent basis driven by safety considerations, congressional mandate, OIG recommendations and general principles of fraud prevention.

c. Domicile

Comments. A number of commenters objected to FMCSA's use of the State of domicile as the *only* jurisdiction for licensure. Many suggested amending this requirement to permit licensure in the State of residency.

FMCSA Response. Congress mandated that the State of licensure for CDLs be the State of domicile. As this is a statutory requirement, FMCSA does not have the authority to make the requested changes.

d. State Compliance Issues

Comments. ATA commented that States may not have the resources to implement the new requirements of this rule in addition to others FMCSA has indicated it will promulgate such as the Medical Certification as Part of the CDL and Entry Level Driver Training. ATA opposes implementation of this rule until FMCSA can demonstrate that the States are consistently showing substantial compliance with the pre-existing CDL program rules. Rather than adoption of new rules, ATA suggests that the Agency should focus on enforcement actions against non-compliant States under existing CDL rules.

FMCSA Response. FMCSA disagrees with ATA's position. The creation of a uniform, national CDL program is an important safety objective that is designed to facilitate improved safety performance and reduce instances of fraud. Many of these program features are mandated by Congress, recommended by the OIG or both. FMCSA believes that implementation of these rules in conjunction with improved enforcement activities will greatly enhance the effectiveness of the CDL program.

IV. Changes to the Proposed Rule in This Final Rule

This final rule makes the following changes to the NPRM, consistent with the discussion of public comments in this preamble, and as further explained below.

Changes To Conform Rule With Medical Certification Final Rule

The NPRM for this final rule was published on April 9, 2008 (73 FR 18272). On December 1, 2008, FMCSA published a final rule to incorporate certain medical certification requirements into the CDL process (73 FR 73096). The medical certification final rule made changes to many of the CFR sections that are affected by this final rule. Therefore the rule language that was proposed has been updated to include those amendments made on December 1, 2008, so that today's amendments make changes to the current rule language. The sections that were updated for this purpose are §§ 383.71, 383.73, 384.206, 384.225, 384.226, and 384.301.

Terminology Changes Throughout

The final rule removes the terms "suspension," "cancellation," and "revocation," in reference to CDLs and CLPs, and replaces them with the term "disqualification." See "CDLs obtained through fraud" in the discussion of comments above for an explanation of this change.

The final rule replaces "nonresident" CDLs and CLPs with "Non-domiciled" CDLs and CLPs in accordance with the definition change at § 383.5. See "Nonresident CDL" in the discussion of comments above for an explanation of this change.

The final rule abbreviates "commercial driver's license" with CDL and "commercial learner's permit" with CLP where appropriate.

Part 383—Commercial Driver's License Standards; Requirements and Penalties

Section 383.5. The final rule changes the proposed rule by adding a definition for "manual transmission" and by changing "nonresident CLP or CDL" to "Non-domiciled CLP or CDL." See "Automatic transmission restriction," "Definition of tank vehicle," and "Nonresident CDL" in the discussion of comments above for an explanation of these changes.

Section 383.9. The final rule does not adopt this section. See "Incorporate by reference AAMVA 2005 CDL Test System" in the discussion of comments above for an explanation of this change.

Section 383.23. The final rule changes paragraph (a) to clarify that the driving tests in question are for a CLP or CDL.

Section 383.25. The final rule changes paragraph (a)(5) by adding subparagraphs (i)–(iv) to allow for a school bus (S) endorsement or a tank vehicle (N) endorsement, under certain circumstances. These subparagraphs also clarify that test examiners, other trainees, or the CDL holder accompanying the CLP holder are not considered passengers with respect to the prohibition of a CLP holder operating a CMV carrying passengers. See "10. LIMIT ENDORSEMENTS ON CLP TO PASSENGER (P) ONLY" in the discussion of comments above for an explanation of these changes. Paragraph (d) is changed to clarify that a CDL holder seeking an upgrade of his/her CDL needs a CLP only if the upgrade requires a skills test. See "CLP prerequisite for CDL" in the discussion of comments above for an explanation of this change.

Table 2 in Section 383.51(c). Our review of the 2008 NPRM (73 FR 19282, 19303), revealed that we made an inadvertent omission with respect to *Table 2 to § 383.51,* in two instances. The headings for columns 2 and 4 should conclude with the phrase: ", if the conviction results in the revocation, cancellation, or suspension of the CLP or CDL holder's license or non-CMV driving privileges," as they do in the current regulations. This does not create any changes to § 383.51(c), Table 2, and merely corrects a typographical error made in the NPRM. As background information, FMCSA published a final rule that implemented the sanctions containing the phrase on January 29, 2003 (68 FR 4394).

Section 383.71. The final rule changes paragraph (a)(8) to reflect the addition of S and N to the list of endorsements available to CLP holders. Changes to paragraph (b)(9), Table 1, reflect the updated list of documents that are acceptable to show legal status for a CDL or CLP. See "Required forms/documents" in the discussion of comments above for an explanation of this change. The final rule changes paragraph (b)(10) to require the applicant to present two documents, instead of one, to establish domicile. Paragraph (f) is changed to clarify that requirements for obtaining Non-domiciled CDLs also apply to Non-domiciled CLPs. Subparagraph (f)(2)(i) sets forth the updated list of documents that are acceptable to show legal status for a Non-domiciled CDL or CLP.

Section 383.73. The final rule changes paragraph (a)(3) to extend a CLP's renewal period to 180 days. For an explanation of this change, see "Initial validity and renewal periods for a CLP" in the discussion of comments above. Changes to paragraph (a)(4) reflect the addition of S and N to the list of endorsements available to CLP holders. The addition of paragraph (c)(9) makes clear that the initial validity period of any CDL transferred from another jurisdiction must also be limited to eight years. The addition of paragraph (e)(9) makes clear that the initial validity period of any CDL that is upgraded is limited to eight years. Paragraph (f) is changed to clarify that requirements for issuing Non-domiciled CDLs also apply to Non-domiciled CLPs. Changes to paragraph (h)(1) remove the requirement that the State must mail a CDL or CLP to an applicant. See "Mailing of initial license" in the discussion of comments above for an explanation of this change. Changes to paragraph (k)(2) remove the requirement that the State must re-test a suspect driver within 30 days of notifying the driver, and replace it with a requirement that, within 30 days of notification, the driver make an appointment for re-testing for the next available appointment. See "CDLs obtained through fraud" in the discussion of comments above for an explanation of this change. Changes to paragraph (m) provide an exception to the rule that two persons check and verify all documents. See "Two staff members verify test scores and other documents" in the discussion of comments above for an explanation of this change.

Section 383.75. The final rule changes paragraphs (a)(2) and (a)(5) to provide that States must conduct inspections and oversight of third party testers and examiners once every 2 years, instead of annually. Changes to paragraph (a)(7) specify that a third party skills tester that is also a driver training school may not administer skills tests to applicants who were trained by that training school. An exception is provided when the nearest alternative third party tester or State skills testing facility is over 50 miles from the training school. Changes to paragraph (a)(8)(ii) clarify its application to skills test examiners. Changes to paragraph (a)(8)(viii) require that third party testers must submit a schedule of upcoming CDL skills test appointments to the State at least two business days before each test, instead of a week in advance. See "Third party testing (annual inspection; advance scheduling of tests; separation of training and testing functions)" in the discussion of comments above for an explanation of these changes. The final rule changes eliminate paragraph (c)(1), removing the requirement that each third party tester must conduct at least 50 skills tests per calendar year. Changes to paragraph (c)(2) provide an alternative for skills test examiners who cannot meet the requirement to conduct at least 10 skills test examinations per year. See "Minimum number of tests conducted (minimum skills tests for testers and examiners)" in the discussion of comments above for an explanation of these changes.

Section 383.93. The final rule changes paragraph (a) to allow for the school bus (S) and tank vehicle (N) endorsements. See "10. LIMIT ENDORSEMENTS ON CLP TO PASSENGER (P) ONLY" in the discussion of comments above for an explanation of these changes.

Section 383.95. The final rule changes paragraph (c)(2) to reflect the definition of "manual transmission" added to § 383.5. See "Automatic transmission restriction" in the discussion of comments above for an explanation of this change. Paragraph (g) is removed because it duplicates text that appears in § 383.25(a)(5).

Section 383.131. The final rule changes paragraphs (a) and (b) to require States to use an FMCSA pre-approved State Testing System. To be approved by FMCSA, the State Testing System must be comparable to AAMVA's "2005 CDL Test System (July 2010 Version)," which FMCSA approves in this rule and will provide to all State Driver Licensing Agencies. Paragraph (c) is moved from this section to § 383.135(c).

Section 383.133. The final rule changes paragraph (b) to require the States to use a pool of test questions, pre-approved by FMCSA, to develop knowledge tests for each vehicle group and endorsement. The pool of questions must be comparable to those in AAMVA's "2005 CDL Test System (July 2010 Version) 2005 Test Item Summary Forms," which FMCSA approves in this rule and will provide to all State Driver Licensing Agencies. Changes to paragraph (c)(5) clarify that examiners may interact with applicants only in English during the skills test. See "11. METHODS OF ADMINISTERING CDL TESTS" in the discussion of comments above for an explanation of this change. Changes to paragraph (c)(6) concern the provision in the proposed rule that prohibits the practice of banking skills test scores. See "Skills test banking prohibition" in the discussion of comments above for an explanation of this change. New subparagraph (c)(6)(iii) specifies that an applicant may only bank test scores during the initial validity period of the CLP. Paragraph (d) is removed because it duplicates § 383.113(c).

Section 383.135. The final rule changes paragraph (b)(2) to reflect the changes in § 383.131(a) and (b). Paragraph (c) is moved from § 383.131(c).

Section 383.153. The final rule changes paragraph (a)(4) to allow States to use black and white engraved photographs on a CDL, as well as color photographs or images. See "Black and white photograph" in the discussion of comments above for an explanation of this change. Changes to paragraph (a)(10) clarify the new restriction codes. See "Uniform endorsement codes" in the discussion of comments above for an explanation of this change. Proposed subparagraph (a)(10)(viii), which is related to exceptions to the CDL and CLP rules is removed because it duplicates text added in accordance with the Medical Certification rule. New subparagraph (a)(10)(viii) adds code V for medical variance. The final rule reverses proposed paragraph (b) by forbidding the inclusion of a photograph or image of the driver on the CLP, instead of requiring the CLP to include this. See "No photograph on CLP " in the discussion of comments above for an explanation of this change. Changes to paragraph (b)(viii) reflect the changes to the endorsements and restrictions applicable to CLPs that are established elsewhere in the final rule.

Part 384—State Compliance With Commercial Driver's License Program

Section 384.201. The final rule provides State Driver Licensing Agencies contact information to obtain a copy of the FMCSA-approved AAMVA 2005 CDL Test System (Version July 2010).

Section 384.217. The final rule clarifies that disqualification offenses are applicable to CLP as well as CDL holders.

Section 384.227. The final rule changes paragraph (a) to permit States to use black and white engraved photographs, as well as color photographs or images, for recording the information. Changes to paragraph (b) require States to check the photograph or image whenever the CLP or CDL is renewed, upgraded, or transferred, or when a duplicate is issued, only when the applicant appears in person. See "Black and white photograph" and "Check photograph on file" in the discussion of comments above for an explanation of these changes.

Section 384.228. The final rule changes this section to split the training requirements into separate standards for

knowledge test examiners and skills test examiners. See "Training requirements for knowledge and skills examiners" in the discussion of comments above for an explanation of this change.

Section 384.229. The final rule changes paragraph (a) to require unannounced on-site inspections once every two years instead of annually. For testers and examiners who are granted the training and skills testing exception under section 383.75(a)(7), the inspections will be annual. The covert and overt monitoring of these excepted testers and examiners in paragraph (b) will be annual. This provision is included to help reduce the opportunity for fraud.

Part 385—Safety Fitness Procedures

The proposals for part 385 are adopted without change in the final rule.

V. Regulatory Analyses and Notices

Executive Order 12866 (Regulatory Planning and Review) and DOT Regulatory Policies and Procedures

The final rule regulatory evaluation estimates the benefits and costs associated with revisions to the Agency's CDL knowledge and skills testing standards. This section of the preamble summarizes the findings of that analysis. For full details the reader is referred to the Regulatory Evaluation contained in the docket. The measures incorporated into this rule are intended to reduce fraud, improve safety, and facilitate entrance into the CMV driver occupation. Many of the provisions of this rule impose minimal costs on the States or industry members, either because many States are already complying with the requirements contained in this rule, or because the requirements have minimal impact on the SDLA or industry operations or procedures. We estimate the following provisions to be of minimal significance: Strengthening the legal presence requirements; Social Security number verification; surrender of the CLP, CDL, and non-CDL documents; establishing maximum issuance and renewal periods for the CLP and CDL; establishing a minimum age for CLP; limiting endorsements on the CLP to passenger, school bus, or tanker only; implementing new standardized endorsement and restriction codes; implementing motor carrier prohibitions; and incorporating regulatory guidance into text. The other provisions in this rule have greater cost implications and include: Minimum standards for issuing a CLP; previous driving offenses by a CLP holder; requirements for out-of-State CDL testing; reciprocal State recognition of CLPs; updating Federal knowledge and skills test standards; and incorporating the SAFE Port Act provisions.

Many of the requirements implemented by this rule impact the States by requiring extra steps to process CLPs and CDLs. These include: Recording CLPs on CDLIS and making the CLP a tamperproof document (under minimum uniform standards for issuing CLPs); checking for previous driving offenses by CLP/CDL holders (which would require an additional search of PDPS records); and implementing one provision of the SAFE Port Act requirements that involves the processing of CDLs and CLPs. We estimate that these provisions, taken together, will add 10 minutes to the amount of time it takes a State to process a license document. It will cost an additional $1.40 per CLP for tamperproofing, plus an additional $1 cost for each CLP placed on CDLIS that is not eventually converted into a CDL. This $1 fee is an annual per-record fee charged by the AAMVA for maintaining the CDLIS. Taking all of these costs together, the estimated cost of these provisions is $2.97 million annually.

FMCSA estimates that those provisions of the SAFE Port Act which require training programs and covert monitoring of skills test examiners will result in additional costs to the States. We estimate that the annual cost of these training requirements vary between $1.35 million to $1.74 million.

Table 1 below presents the total cost of these provisions over 10 years. In addition to the cost of specific provisions contained in this rule, we budgeted $400,000 per State for the IT system development and upgrades that are needed to comply with these requirements. These costs are presented in the IT Upgrades row. Years 6–10 mimic years 2–5 with respect to cost, and are therefore aggregated in one column. As can be seen, the discounted total cost of these provisions varies between $13.2 and $35.3 million per year. The 10 year cost of this rule is estimated at $156.5 million, or $122.9 million discounted at 7 percent.

TABLE 1—COSTS OF RULE

[In thousands]

	Year 1	Year 2	Year 3	Year 4	Year 5	Years 6—10	Total
CDL Processing	$2,965	$2,965	$2,965	$2,965	$2,965	$14,827	$29,654
Skills Test Training	1,740	0	0	0	1,354	1,354	4,448
Driver Travel and Lost Wages	10,200	10,200	10,200	10,200	10,200	51,000	102,000
IT Upgrades	20,400	0	0	0	0	0	20,400
Total	35,306	13,165	13,165	13,165	14,519	67,181	156,502
Total, 7 percent discount	35,306	12,304	11,499	10,747	11,077	41,970	122,902

Safety Benefits

Although it is difficult to fully quantify the safety benefits of this rule, the Agency believes that reducing fraud in the CDL system will improve safety on public roads. We estimated monetized safety benefits of the rule at the NPRM stage. Although some commenters expressed doubt that the provisions of the rule would in fact reduce fraud, no commenters took issue with our assertion that drivers who obtain CDLs fraudulently are likely to pose a public safety risk when compared to drivers who legitimately pass the CDL skills test. Drivers who obtain CDLs fraudulently either lack the skills or knowledge to pass the CDL skills or knowledge test, or have some other reason (such as plans to engage in criminal activity) for concealing their true identity. The Agency believes that drivers who have fraudulently obtained CDLs are significantly more dangerous to the public than those who obtain CDLs properly. Fraudulent CDL holders have failed to demonstrate that they can control their vehicle properly, and hence pose an increased safety risk. We have estimated that the annual discounted safety benefits of this rule vary approximately between $10.5–$57.2 million. Total 10 year net benefits are approximately $267.8 million.

Regulatory Flexibility Act

The Regulatory Flexibility Act requires Federal agencies to take small businesses' particular concerns into account when developing, writing, publicizing, promulgating and enforcing regulations. To achieve this, the Act requires that agencies detail how they have met these concerns, by including a Regulatory Flexibility Analysis (RFA), which includes the following five elements:

(1) A succinct statement of the need for and objectives of the rule;

(2) A summary of the significant issues raised during public comments in response to the initial regulatory flexibility analysis, a summary of the Agency's assessment of such issues, and a statement of any changes made in the proposed rule as a result of such comments;

(3) A description and, where feasible, an estimate of the number of small entities to which the rule applies;

(4) A description of the reporting, recordkeeping, and other compliance requirements of the rule, including an estimate of the classes of small entities which are subject to the requirements and the type of professional skills necessary for preparation of the report or record;

(5) A description of the steps the agency has taken to minimize the significant economic impacts on small entities consistent with the stated objectives of applicable statutes, including a statement of the factual, policy and legal reasons for selecting the alternative adopted in the final rule, and the reasons for rejecting each of the other significant alternatives.

A discussion of these requirements follows.

(1) A succinct statement of the need for and objectives of the rule.

This action is being taken in response to OIG recommendations for preventing fraud in the CDL system. In at least one case, a driver who obtained a CDL fraudulently has been involved in a fatal crash. The SAFE Ports Act requires the Agency to adopt the OIG recommendations for combating fraud in the CDL system, and this rule fulfills that mandate. In addition, the current domicile requirement poses a potential barrier to entry to the CMV driver occupation. The changes in this rule enable drivers to choose the most convenient, cost-effective training option available to them regardless of whether it is in their State of domicile.

The objectives of this rule are to improve public safety by preventing fraud in the CLP/CDL licensing system, to standardize testing and CLP and CDL issuance across the States, and to facilitate the ability of drivers to seek the most convenient, cost effective training, thereby facilitating entry into the CMV driver occupation. This rulemaking is based on the broad authority of the Commercial Motor Vehicle Safety Act of 1986 (CMVSA) (Title XII of Pub. L. 99–570, 100 Stat. 3207–170, codified at 49 U.S.C. chapter 313), the Motor Carrier Safety Act of 1984 (MCSA) (Title II of Pub. L. 98–554, 98 Stat. 2832, codified at 49 U.S.C. 31136), and the safety provisions of the Motor Carrier Act of 1935 (MCA) (Chapter 498, 49 Stat. 543, codified at 49 U.S.C. 31502). It is also based on the specific directives of section 4122 of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA–LU) (Pub. L. 109–59, 119 Stat. 1144, at 1734, codified at 49 U.S.C. 31302, 31308, and 31309), and section 703 of the Security and Accountability For Every Port Act of 2006 (SAFE Port Act) (Pub. L. 109–347, 120 Stat. 1884, at 1944).

(2) A summary of the significant issues raised during public comments in response to the initial regulatory flexibility analysis, a summary of the Agency's assessment of such issues, and a statement of any changes made in the proposed rule as a result of such comments.

The Agency did not receive any comments on the initial regulatory flexibility analysis.

(3) A description and, where feasible, an estimate of the number of small entities to which the rule applies.

In compliance with the Regulatory Flexibility Act (5 U.S.C. 601–612), FMCSA considered the effects of this regulatory action on small entities, as defined by the U.S. Small Business Administration's (SBA's) Office of Size Standards.

SBA regulations (13 CFR part 121) require Federal agencies to analyze the impact of proposed and final rules on small entities. The regulations define a "small entity" in the motor carrier industry by average annual receipts, which are currently set at $25.5 million per firm. FMCSA has used data on revenue generated per power unit to determine that a carrier with approximately 145 power units would exceed the small business revenue level set by the SBA. Ninety-nine percent of motor carriers have fewer than 145 power units, and therefore could be expected to fall under the SBA's definition of a small business for this industry, with annual receipts of less than $25.5 million.

A recent (June 2010) data query of the Agency's MCMIS database indicates a total of approximately 498,465 active interstate motor carriers. This number includes both for-hire and private carriers, and includes some intrastate drivers as well as interstate drivers, because some interstate motor carriers conduct intrastate operations, and employ both types of drivers. For the purposes of this analysis, we rounded this figure up to the nearest 5,000, to thus 500,000 active motor carriers. A lack of activity is defined as carriers that have not had a crash, roadside vehicle or driver inspection, or compliance review, or have not updated their MCS–150 form in the past three years. Approximately 99 percent of these carriers are estimated to be small businesses as defined by the SBA, or approximately 495,000 currently active motor carriers ($500{,}000 \times 0.99 = 495{,}000$).

While this rule applies to drivers and does not affect motor carriers directly, owner-operators would be directly affected by the new driver licensing requirements because in these businesses the owner and driver are the same person. As a result, any regulations that affect the driver affect the small business owner as well. According to Professor Lafontaine of the University of Michigan, there are approximately 300,000 owner-operators currently in business in the U.S.[3] In a recent report for the ATA, Global Insight estimated a similar number of owner-operators.[4] As of May 2008, our MCMIS database shows approximately 340,000 owner-operators.

The Agency believes that all owner-operators would qualify as small businesses under the SBA's definition. This rule would therefore apply to approximately 340,000 owner-operator firms. These firms would have to supply more extensive proof of legal presence under this rule, but otherwise would not be affected greatly by additional reporting or recordkeeping requirements. This extra documentation would require extra time spent at SDLAs every time a driver sought a new license or permit, license transfer, or upgrade. In the regulatory evaluation, the opportunity cost of this time was estimated to be $18.62 per hour per driver. It is estimated that approximately 10 extra minutes would

[3] Francine Lafontaine, Incentive Contracting in Practice: A Detailed Look at Owner Operator Leases in the US Truckload Trucking Industry, Working Paper, June 2000, available at: *http://webuser.bus.umich.edu/Departments/BusEcon/research/workingpapers.html#lafontaine.*

[4] Global Insight, The U.S. Truck Driver Shortage: Analysis and Forecasts, Prepared for ATA, May 2005, available at *http://www.truckline.com/NR/rdonlyres/E2E789CF-F308-463F-8831-0F7E283A0218/0/ATADriverShortageStudy05.pdf.*

be required to obtain a CDL, and that the value of this extra time would therefore be $3.10 per driver obtaining a CDL ($18.62 × 10/60 = $3.10). Given that few owner-operators would have to obtain a CDL in any particular year, and the low cost involved, this rule has been deemed by the Agency not to have a significant impact on small trucking companies.

Third party skills test examiners would also be affected by this rule. These examiners would undergo periodic covert monitoring, but assuming they are administering the skills test properly, this monitoring would be costless to them. In addition, the employees who conduct skills testing may have to participate in additional training in order to remain eligible to conduct skills test examinations. The Agency estimates that there are approximately 1,200 third party skills testing organizations currently in operation in the U.S. Most of these skills testing organizations are also motor carriers, educational institutions, or municipalities that train their own drivers. For most skills-testers, the revenue generated by offering skills testing is a small portion of the total revenue generated by the business. Information on these organizations is difficult to obtain, but the Agency is aware that some are affiliated with larger motor carriers. Others would qualify as small businesses, but the Agency is currently unsure of how many might fall into the small business category. We estimate that at least half, or 600, skills testing organizations are small businesses. These organizations would have to bear the cost of enhanced training of the examiners they employ. These costs were estimated in the Regulatory Impact Analysis at $200 per examiner per day of training, at an average of one-half day of training every year. The cost to these entities would therefore be approximately $100 per year per skills test examiner employed. The Agency believes that each skills test examiner organization would have between 1 and 2 skills test examiners. This rule would therefore cost the 600 affected entities a maximum of $90,000 per year (600 entities × 1.5 skills test examiners × $100 = $90,000 per year), or $150 per year per entity.

Given these costs, the Agency does not believe that this rule has a significant impact on a substantial number of small businesses.

(4) A description of the reporting, recordkeeping, and other compliance requirements of the rule, including an estimate of the classes of small entities which are subject to the requirements and the type of professional skills necessary for preparation of the report or record.

This rule requires drivers to present their social security number, one proof of citizenship or legal presence, and a proof of current address to their SDLA when applying for a new CLP, CDL or a CDL transfer or upgrade. The Agency believes that most U.S. citizens possess these documents and will be able to provide them to the SDLA. No specialized skills are required to obtain these documents or present them to an SDLA agent. We therefore do not believe that this rule poses an undue recordkeeping burden on small businesses in the motor carrier industry.

Third party test examiners must, under current regulations, transmit to SDLAs the results of the skills tests they have conducted, including both information identifying the driver-applicant and the examiner who conducted the test. This rule will require examiners to obtain periodic training on conducting the skills test. The third party testing organizations will have to maintain records of their examiners' participation in this mandatory training. The Agency believes that keeping these records will be a minimal burden on skills test examiners.

(5) A description of the steps the agency has taken to minimize the significant economic impacts on small entities consistent with the stated objectives of applicable statutes, including a statement of the factual, policy and legal reasons for selecting the alternative adopted in the final rule, and the reasons for rejecting each of the other significant alternatives.

The agency has taken all steps it deems practical to minimize the impact of this rule on both large and small entities. The impacts of this rule on various entities, and attempts to mitigate them, are described in full in the rule preamble and the regulatory analysis. The Agency has, among other steps, reduced the third party skills tester monitoring proposed in the NPRM, and has chosen the alternative that imposes the smallest barrier, given statutory limitations, for entry into the motor carrier industry or CMV operator occupation. All of the alternatives considered in this rule would have similar impacts on small skills test examiners. This rule does not impact motor carriers directly, so it has no disproportional impact on smaller businesses in that industry.

In compliance with the Regulatory Flexibility Act (5 U.S.C. 601–612), FMCSA has considered the effects of this proposed regulatory action on small entities and determined that this final rule does not have a significant impact on a substantial number of small entities, as defined by the SBA's Office of Size Standards. As described above, this rule not have a direct impact on motor carriers, *unless* those motor carriers also operate as third party testers. The requirements primarily affect States, drivers—during the CDL application and testing process—before they are employed by motor carriers, and third party CDL skills testers. Most carriers that operate driver training schools and conduct third party testing would be too large to qualify as small businesses. In addition, the requirements on third party skills testers are fairly minimal and require primarily that skills test examiners undergo periodic training to stay up to date on their knowledge of the CDL skills test. The costs of these requirements are estimated to be approximately $150 per year per skills test examiner. In order for this amount to exceed one percent of the revenue of a skills testing organization, the gross revenue for the firm would have to be less than $15,000. Although we do not have revenue figures for third party testers, we are confident that most of these organizations would have revenues exceeding this amount, and that impacts on these entities would therefore not be substantial.

The other affected entities are drivers. Drivers however are affected prior to being employed in the industry, and therefore, impacts on them are, by and large, not impacts on motor carriers and hence not impacts on small entities. The one possible exception to this rule might be a prospective owner-operator, but most owner-operators have experience in the industry working for a larger carrier prior to purchasing their own truck and engaging in business for themselves. The instances of newly trained and tested drivers becoming owner-operators, before gaining industry experience, are very rare. As a result, this rule does not have direct impacts on small entities in the motor carrier industry. For these reasons, the Agency does not believe that this rule would have a substantial impact on a substantial number of small entities in the motor carrier industry.

Unfunded Mandates Reform Act of 1995

The Unfunded Mandates Reform Act requires new Federal regulations to be accompanied by an analysis of their fiscal impacts on State, local, and tribal governments and on private industry. Although the attached regulatory evaluation provides much of this information, it will be summarized here, with an emphasis on effects on State

and local governments, since this final rule does not have any major effects on private industry. Many of the provisions in this final rule affect the States, but the size of this impact is small. The total annual cost of the rule is estimated to vary between approximately $13 million and $35 million, undiscounted. These costs are imposed primarily upon the States, which bear the increased cost of processing driver's licenses, training and monitoring skills test examiners, and implementing any changes to computer systems required to implement these changes.

The quantified benefits of this rule are the reduced cost to public safety and society due to avoidance of crashes that would otherwise occur. These benefits accrue primarily to active CDL licensed drivers, motor carriers and their insurers, and other users of the nation's public highways. These benefits have been estimated to grow annually from approximately $10 million in the first year to $57 million in the 10th year (undiscounted). These benefits outweigh the costs to the States. Although we cannot quantify them, we expect that facilitation of access to training schools and testing will yield benefits to the industry and prospective drivers.

Given the modest cost of this rule, the Agency finds that it will not have a significant impact on the States because this rule will not impose an unfunded Federal mandate, as defined by the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1532, *et seq.*), that would result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $140.8 million (as adjusted by DOT Guidance, April 28, 2010, to reflect inflation) or more in any one year.

Executive Order 12988 (Civil Justice Reform)

This action meets applicable standards in sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity, and reduce burden.

Executive Order 13045 (Protection of Children)

FMCSA has analyzed this action under Executive Order 13045, Protection of Children from Environmental Health Risks and Safety Risks. We have determined that this rulemaking does not concern an environmental risk to health or safety that may disproportionately affect children.

Executive Order 12630 (Taking of Private Property)

This rule will not effect a taking of private property or otherwise have taking implications under Executive Order 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights.

Executive Order 13132 (Federalism)

FMCSA has analyzed this rule in accordance with the principles and criteria of Executive Order 13132, "Federalism," and has determined that it does not have federalism implications.

The Federalism Order applies to "policies that have federalism implications," which it defines as regulations and other actions that have "substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government." Sec. 1(a). The key concept here is "substantial direct effects on the States." Sec. 3(b) of the Federalism Order provides that "[n]ational action limiting the policymaking discretion of the States shall be taken only where there is constitutional and statutory authority for the action and the national activity is appropriate in light of the presence of a problem of national significance."

The rule amends the commercial driver's license (CDL) program authorized by the Commercial Motor Vehicle Safety Act of 1986 (49 U.S.C. chapter 313). States have been issuing CDLs in accordance with Federal standards for well over a decade. The CDL program does not have preemptive effect. It is voluntary; States may withdraw at any time, although doing so will result in the loss of certain Federal-aid highway funds pursuant to 49 U.S.C. 31314. Because this rule makes only small, though numerous, incremental changes to the requirements already imposed on participating States, FMCSA has determined that it does not have substantial direct effects on the States, on the relationship between the Federal and State governments, or on the distribution of power and responsibilities among the various levels of government.

Nonetheless, FMCSA recognizes that this rule has an impact on the States and their commercial driver licensing operations. Most significantly, it requires all participating States to implement a CLP and prohibit the issuance of a CDL unless the applicant has first obtained a CLP and held it for a minimum of 14 days. The Agency hopes drivers will use this interval to obtain formal training. States also are required to use a State Testing System pre-approved by FMCSA to administer knowledge and skills tests. To be approved by FMCSA, the State Testing System must be comparable to AAMVA's "2005 CDL Test System (July 2010 Version)," which FMCSA approves in this rule and will provide to all State Driver Licensing Agencies. Over the years, FMCSA and the States have identified CDL program deficiencies that need to be addressed. The OIG has focused attention on measures to prevent licensing fraud. Measures to address these issues, and others included in this rule, improve the effectiveness of the CDL program, but also require participating States to change their programs in a variety of ways. By letter dated October 31, 2007, the Agency notified the National Governor's Association (NGA) that it was developing these proposals to provide State and local governments the opportunity to raise Federalism issues during the comment period for the NPRM. The NGA did not file comments in this docket. No Federalism issues were otherwise brought to the Agency's attention during the comment period.

Privacy Impact Assessment

Section 522 of the FY 2005 Omnibus Appropriations Act, enacted December 8, 2004, (Note to 5 U.S.C. 552a) requires the Agency to conduct a privacy impact assessment (PIA) of a regulation that will affect the privacy of individuals. This rulemaking requires new minimum Federal standards for States to issue CLPs as a pre-condition for a CDL. It requires that an applicant for a CLP must first pass a knowledge test which complies with prescribed minimum standards and may have only one CLP at a time. It further requires that the data on each CLP holder must be added to the driver's record in CDLIS. Therefore, the information will be held to the same level of security as other information contained in CDLIS.

Although each State is required to create a CDLIS record for each CLP it issues, the Privacy Act applies only to Federal agencies and any non-Federal agency which receives records contained in a system of records from a Federal agency for use in a matching program. The CDLIS records, however, are not transferred from FMCSA to the States; they are created and maintained by the States. FMCSA has determined this rule would not result in a new or revised Privacy Act System of Records for FMCSA.

Executive Order 12372 (Intergovernmental Review)

The regulations implementing Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities do not apply to this program.

Paperwork Reduction Act

Under the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501 *et seq.*), Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct, sponsor, or require through regulations. This rulemaking will affect a currently-approved information collection covered by the OMB Control No. 2126–0011 titled, "Commercial Driver Licensing and Test Standards." The currently approved information collection has an annual burden of 1,391,456 hours and will expire on May 31, 2012.

This action updates and provides more uniform procedures for ensuring that the applicant has the appropriate knowledge and skills to operate a commercial motor vehicle. It also establishes the minimum information that must be on the CLP document and the electronic driver's record in CDLIS, makes it a tamperproof document, and establishes maximum issuance and renewal periods for the CLP and CDL. The FMCSA believes this rule will result in a significant increase in the annual burden hours for this information collection.

The following table summarizes the annual information collection burden hours for current and future information collection activities for the first 3 years of implementation of the new requirements and for the 4th and subsequent years of maintaining the CDL program with the new requirements. The increase in annual burden hours for the first 3 years of 25,216 hours is due to knowledge and skills test examiner training and certification. The increase in annual burden hours of 595,348 hours for the 4th and subsequent years is due to a combination of activities, including the full implementation of the merging of the medical certification and CDL processes (211,910 hours) and the implementation of the new requirements for CDL testing and the issuance of CLPs (383,438 hours). A detailed analysis of the annual burden hour changes for each information collection activity can be found in the Supporting Statement of OMB Control Number 2126–0011.

CURRENT AND FUTURE INFORMATION COLLECTION BURDENS

Current and future information collection activities for states and CDL drivers	Currently approved annual burden hours	Future annual burden hours for first 3 years (program change)	Future annual burden hours for 4th and subsequent years (program change)
State to obtain and record the medical certificate information	0	0	*205,333
State recording of medical certification status	0	0	*3,984
State to verify the medical certification status of all interstate CDL drivers	0	0	*2,593
Driver to notify employer of convictions/disqualifications	640,000	640,000	640,000
Driver to complete previous employment paperwork	403,200	403,200	403,200
States to complete compliance certification documents	1,632	1,632	1,632
State to complete compliance review documents	2,400	2,400	2,400
Data/document checks and CDLIS recordkeeping	212,224	212,224	582,285
Drivers to complete the CDL application	48,000	48,000	56,486
CDL tests recordkeeping	84,000	84,000	77,910
Knowledge and skills test examiner certification	0	25,216	7,658
Skills test examiner monitoring and auditing	0	0	28,539
Total Burden Hours	1,391,456	1,416,672	2,012,020

Note: * See currently approved (May 13, 2009) Information Collection Supporting Statement.

National Environmental Policy Act

The FMCSA analyzed this rulemaking for the purpose of the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321 *et seq.*) and determined under its environmental procedures Order 5610.1, published March 1, 2004 in the **Federal Register** (69 FR 9680), that this action is categorically excluded (CE) under Paragraph 4.s of the Order from further environmental documentation. That CE relates to establishing regulations and actions taken pursuant to these regulations concerning requirements for drivers to have a single commercial motor vehicle driver's license. In addition, the Agency believes that the action includes no extraordinary circumstances that will have any effect on the quality of the environment. Thus, the action does not require an environmental assessment or an environmental impact statement.

The FMCSA has also analyzed this rule under the Clean Air Act, as amended (CAA), section 176(c) (42 U.S.C. 7401 *et seq.*), and implementing regulations promulgated by the Environmental Protection Agency. Approval of this action is exempt from the CAA's general conformity requirement since it involves rulemaking and policy development and issuance.

Executive Order 13211 (Energy Effects)

The FMCSA has analyzed this action under Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution or Use. The Agency has determined that it is not a "significant energy action" under that Executive Order because it will not be economically significant and will not be likely to have a significant adverse effect on the supply, distribution, or use of energy.

List of Subjects

49 CFR Part 383

Administrative practice and procedure, Alcohol abuse, Drug abuse, Highway safety, Incorporation by reference, Motor carriers.

49 CFR Part 384

Administrative practice and procedure, Alcohol abuse, Drug abuse, Highway safety, Motor carriers.

49 CFR Part 385

Highway safety, Highways and roads, Motor carriers, Motor vehicle safety, Safety fitness procedures.

The Final Rule

Accordingly, FMCSA amends parts 383, 384, and 385 of title 49 of the Code of Federal Regulations as set forth below:

PART 383—COMMERCIAL DRIVER'S LICENSE STANDARDS; REQUIREMENTS AND PENALTIES

■ 1. The authority citation for part 383 continues to read as follows:

Authority: 49 U.S.C. 521, 31136, 31301 *et seq.,* and 31502; secs. 214 and 215 of Pub. L. 106–159, 113 Stat. 1766, 1767; sec. 1012(b) of Pub. L. 107–56, 115 Stat. 397; sec. 4140 of Pub. L. 109–59, 119 Stat. 1144, 1726; and 49 CFR 1.73.

■ 2. Amend § 383.5 by:
■ a. Removing the definitions for *nonresident CDL* and *serious traffic violation;*
■ b. Revising the definitions for *commercial driver's license (CDL), commercial motor vehicle* (CMV), *disqualification, driver applicant, endorsement, imminent hazard, tank vehicle,* and *United States;* and
■ c. Adding new definitions for *CDL driver, non-CDL, commercial learner's permit (CLP), manual transmission, non-domiciled CLP or Non-domiciled CDL, third party skills test examiner,* and *third party tester* .

The revisions and additions read as follows:

§ 383.5 Definitions.

* * * * *

CDL driver means a person holding a CDL or a person required to hold a CDL.

* * * * *

Commercial driver's license (CDL) means a license issued to an individual by a State or other jurisdiction of domicile, in accordance with the standards contained in this part, which authorizes the individual to operate a class of a commercial motor vehicle.

* * * * *

Commercial learner's permit (CLP) means a permit issued to an individual by a State or other jurisdiction of domicile, in accordance with the standards contained in this part, which, when carried with a valid driver's license issued by the same State or jurisdiction, authorizes the individual to operate a class of a commercial motor vehicle when accompanied by a holder of a valid CDL for purposes of behind-the-wheel training. When issued to a CDL holder, a CLP serves as authorization for accompanied behind-the-wheel training in a CMV for which the holder's current CDL is not valid.

Commercial motor vehicle (CMV) means a motor vehicle or combination of motor vehicles used in commerce to transport passengers or property if the motor vehicle—

(1) Has a gross combination weight rating or gross combination weight of 11,794 kilograms or more (26,001 pounds or more), whichever is greater, inclusive of a towed unit(s) with a gross vehicle weight rating or gross vehicle weight of more than 4,536 kilograms (10,000 pounds), whichever is greater; or

(2) Has a gross vehicle weight rating or gross vehicle weight of 11,794 or more kilograms (26,001 pounds or more), whichever is greater; or

(3) Is designed to transport 16 or more passengers, including the driver; or

(4) Is of any size and is used in the transportation of *hazardous materials* as defined in this section.

* * * * *

Disqualification means any of the following three actions:

(1) The suspension, revocation, or cancellation of a CLP or CDL by the State or jurisdiction of issuance.

(2) Any withdrawal of a person's privileges to drive a CMV by a State or other jurisdiction as the result of a violation of State or local law relating to motor vehicle traffic control (other than parking, vehicle weight or vehicle defect violations).

(3) A determination by the FMCSA that a person is not qualified to operate a commercial motor vehicle under part 391 of this subchapter.

Driver applicant means an individual who applies to a State or other jurisdiction to obtain, transfer, upgrade, or renew a CDL or to obtain or renew a CLP.

* * * * *

Endorsement means an authorization to an individual's CLP or CDL required to permit the individual to operate certain types of commercial motor vehicles.

* * * * *

Imminent hazard means the existence of a condition relating to hazardous material that presents a substantial likelihood that death, serious illness, severe personal injury, or a substantial endangerment to health, property, or the environment may occur before the reasonably foreseeable completion date of a formal proceeding begun to lessen the risk of that death, illness, injury or endangerment.

Manual transmission (also known as a stick shift, stick, straight drive or standard transmission) means a transmission utilizing a driver-operated clutch that is activated by a pedal or lever and a gear-shift mechanism operated either by hand or foot. All other transmissions, whether semi-automatic or automatic, will be considered automatic for the purposes of the standardized restriction code.

* * * * *

Non-CDL means any other type of motor vehicle license, such as an automobile driver's license, a chauffeur's license, or a motorcycle license.

Non-domiciled CLP or Non-domiciled CDL means a CLP or CDL, respectively, issued by a State or other jurisdiction under either of the following two conditions:

(1) To an individual domiciled in a foreign country meeting the requirements of § 383.23(b)(1).

(2) To an individual domiciled in another State meeting the requirements of § 383.23(b)(2).

* * * * *

Tank vehicle means any commercial motor vehicle that is designed to transport any liquid or gaseous materials within a tank or tanks having an individual rated capacity of more than 119 gallons and an aggregate rated capacity of 1,000 gallons or more that is either permanently or temporarily attached to the vehicle or the chassis. A commercial motor vehicle transporting an empty storage container tank, not designed for transportation, with a rated capacity of 1,000 gallons or more that is temporarily attached to a flatbed trailer is not considered a tank vehicle.

* * * * *

Third party skills test examiner means a person employed by a third party tester who is authorized by the State to administer the CDL skills tests specified in subparts G and H of this part.

Third party tester means a person (including, but not limited to, another State, a motor carrier, a private driver training facility or other private institution, or a department, agency or instrumentality of a local government) authorized by the State to employ skills test examiners to administer the CDL skills tests specified in subparts G and H of this part.

United States means the 50 States and the District of Columbia.

* * * * *

■ 3. Revise § 383.23 to read as follows:

§ 383.23 Commercial driver's license.

(a) *General rule.* (1) No person shall operate a commercial motor vehicle unless such person has taken and passed written and driving tests for a

CLP or CDL that meet the Federal standards contained in subparts F, G, and H of this part for the commercial motor vehicle that person operates or expects to operate.

(2) Except as provided in paragraph (b) of this section, no person may legally operate a CMV unless such person possesses a CDL which meets the standards contained in subpart J of this part, issued by his/her State or jurisdiction of domicile.

(b) *Exception.* (1) If a CMV operator is not domiciled in a foreign jurisdiction that the Administrator has determined tests drivers and issues CDLs in accordance with, or under standards similar to, the standards contained in subparts F, G, and H of this part,[1] the person may obtain a Non-domiciled CLP or Non-domiciled CDL from a State that does comply with the testing and licensing standards contained in such subparts F, G, and H of this part, so long as that person meets the requirements of § 383.71(f).

(2) If an individual is domiciled in a State while that State is prohibited from issuing CDLs in accordance with § 384.405 of this subchapter, that individual is eligible to obtain a Non-domiciled CLP or Non-domiciled CDL from any State that elects to issue a Non-domiciled CDL and which complies with the testing and licensing standards contained in subparts F, G, and H of this part, so long as that person meets the requirements of § 383.71(f).

(3) If an individual possesses a CLP, as defined in § 383.5, the individual is authorized to operate a class of CMV as provided by the CLP in accordance with § 383.25.

■ 4. Add § 383.25 to subpart B to read as follows:

§ 383.25 Commercial learner's permit (CLP).

(a) A CLP is considered a valid CDL for purposes of behind-the-wheel training on public roads or highways, if all of the following minimum conditions are met:

(1) The CLP holder is at all times accompanied by the holder of a valid CDL who has the proper CDL group and endorsement(s) necessary to operate the CMV. The CDL holder must at all times be physically present in the front seat of the vehicle next to the CLP holder or, in the case of a passenger vehicle, directly behind or in the first row behind the driver and must have the CLP holder under observation and direct supervision.

(2) The CLP holder holds a valid driver's license issued by the same jurisdiction that issued the CLP.

(3) The CLP holder must have taken and passed a general knowledge test that meets the Federal standards contained in subparts F, G, and H of this part for the commercial motor vehicle that person operates or expects to operate.

(4) The CLP holder must be 18 years of age or older.

(5) Endorsements:

(i) A CLP holder with a passenger (P) endorsement must have taken and passed the P endorsement knowledge test. A CLP holder with a P endorsement is prohibited from operating a CMV carrying passengers, other than Federal/State auditors and inspectors, test examiners, other trainees, and the CDL holder accompanying the CLP holder as prescribed by paragraph (a)(1) of this section. The P endorsement must be class specific.

(ii) A CLP holder with a school bus (S) endorsement must have taken and passed the S endorsement knowledge test. A CLP holder with an S endorsement is prohibited from operating a school bus with passengers other than Federal/State auditors and inspectors, test examiners, other trainees, and the CDL holder accompanying the CLP holder as prescribed by paragraph (a)(1) of this section.

(iii) A CLP holder with a tank vehicle (N) endorsement must have taken and passed the N endorsement knowledge test. A CLP holder with an N endorsement may only operate an empty tank vehicle and is prohibited from operating any tank vehicle that previously contained hazardous materials that has not been purged of any residue.

(iv) All other Federal endorsements are prohibited on a CLP.

(6) The CLP holder does not operate a commercial motor vehicle transporting hazardous materials as defined in § 383.5.

(b) The CLP must be a separate document from the CDL or non-CDL.

(c) The CLP must be valid for no more than 180 days from the date of issuance. The State may renew the CLP for an additional 180 days without requiring the CLP holder to retake the general and endorsement knowledge tests.

(d) The issuance of a CLP is a precondition to the initial issuance of a CDL. The issuance of a CLP is also a precondition to the upgrade of a CDL if the upgrade requires a skills test.

(e) The CLP holder is not eligible to take the CDL skills test in the first 14 days after initial issuance of the CLP.

■ 5. Revise § 383.37 to read as follows:

§ 383.37 Employer responsibilities.

No employer may knowingly allow, require, permit, or authorize a driver to operate a CMV in the United States in any of the following circumstances:

(a) During any period in which the driver does not have a current CLP or CDL or does not have a CLP or CDL with the proper class or endorsements. An employer may not use a driver to operate a CMV who violates any restriction on the driver's CLP or CDL.

(b) During any period in which the driver has a CLP or CDL disqualified by a State, has lost the right to operate a CMV in a State, or has been disqualified from operating a CMV.

(c) During any period in which the driver has more than one CLP or CDL.

(d) During any period in which the driver, or the CMV he/she is driving, or the motor carrier operation, is subject to an out-of-service order.

(e) In violation of a Federal, State, or local law or regulation pertaining to railroad-highway grade crossings.

■ 6. In § 383.51:

■ a. Revise paragraph (a);

■ b. Revise paragraph (b) introductory text and the column headings for Table 1;

■ c. Revise paragraph (c) introductory text and the column headings for Table 2;

■ d. Revise paragraph (d) introductory text and the column headings for Table 3; and

■ e. Revise paragraph (e) introductory text and the column headings for Table 4.

The revisions read as follows:

§ 383.51 Disqualification of drivers.

(a) *General.* (1) A person required to have a CLP or CDL who is disqualified must not drive a CMV.

(2) An employer must not knowingly allow, require, permit, or authorize a driver who is disqualified to drive a CMV.

(3) A holder of a CLP or CDL is subject to disqualification sanctions designated in paragraphs (b) and (c) of this section, if the holder drives a CMV or non-CMV and is convicted of the violations listed in those paragraphs.

(4) Determining first and subsequent violations. For purposes of determining

[1] Effective December 29, 1988, the Administrator determined that commercial driver's licenses issued by Canadian Provinces and Territories in conformity with the Canadian National Safety Code are in accordance with the standards of this part. Effective November 21, 1991, the Administrator determined that the new Licencias Federales de Conductor issued by the United Mexican States are in accordance with the standards of this part. Therefore, under the single license provision of § 383.21, a driver holding a commercial driver's license issued under the Canadian National Safety Code or a new Licencia Federal de Conductor issued by Mexico is prohibited from obtaining a non-domiciled CDL, or any other type of driver's license, from a State or other jurisdiction in the United States.

first and subsequent violations of the offenses specified in this subpart, each conviction for any offense listed in Tables 1 through 4 to this section resulting from a separate incident, whether committed in a CMV or non-CMV, must be counted.

(5) The disqualification period must be in addition to any other previous periods of disqualification.

(6) Reinstatement after lifetime disqualification. A State may reinstate any driver disqualified for life for offenses described in paragraphs (b)(1) through (8) of this section (Table 1 to § 383.51) after 10 years, if that person has voluntarily entered and successfully completed an appropriate rehabilitation program approved by the State. Any person who has been reinstated in accordance with this provision and who is subsequently convicted of a disqualifying offense described in paragraphs (b)(1) through (8) of this section (Table 1 to § 383.51) must not be reinstated.

(b) *Disqualification for major offenses.* Table 1 to § 383.51 contains a list of the offenses and periods for which a person who is required to have a CLP or CDL is disqualified, depending upon the type of vehicle the driver is operating at the time of the violation, as follows:

TABLE 1 TO § 383.51

If a driver operates a motor vehicle and is convicted of:	For a first conviction or refusal to be tested while operating a CMV, a person required to have a CLP or CDL and a CLP or CDL holder must be disqualified from operating a CMV for * * *	For a first conviction or refusal to be tested while operating a non-CMV, a CLP or CDL holder must be disqualified from operating a CMV for * * *	For a first conviction or refusal to be tested while operating a CMV transporting hazardous materials required to be placarded under the Hazardous Materials Regulations (49 CFR part 172, subpart F), a person required to have a CLP or CDL and a CLP or CDL holder must be disqualified from operating a CMV for * * *	For a second conviction or refusal to be tested in a separate incident of any combination of offenses in this Table while operating a CMV, a person required to have a CLP or CDL and a CLP or CDL holder must be disqualified from operating a CMV for * * *	For a second conviction or refusal to be tested in a separate incident of any combination of offenses in this Table while operating a non-CMV, a CLP or CDL holder must be disqualified from operating a CMV for * * *

* * * * *

(c) *Disqualification for serious traffic violations.* Table 2 to § 383.51 contains a list of the offenses and the periods for which a person who is required to have a CLP or CDL is disqualified, depending upon the type of vehicle the driver is operating at the time of the violation, as follows:

TABLE 2 TO § 383.51

If the driver operates a motor vehicle and is convicted of:	For a second conviction of any combination of offenses in this Table in a separate incident within a 3-year period while operating a CMV, a person required to have a CLP or CDL and a CLP or CDL holder must be disqualified from operating a CMV for * * *	For a second conviction of any combination of offenses in this Table in a separate incident within a 3-year period while operating a non-CMV, a CLP or CDL holder must be disqualified from operating a CMV, if the conviction results in the revocation, cancellation, or suspension of the CLP or CDL holder's license or non-CMV driving privileges, for * * *	For a third or subsequent conviction of any combination of offenses in this Table in a separate incident within a 3-year period while operating a CMV, a person required to have a CLP or CDL and a CLP or CDL holder must be disqualified from operating a CMV for * * *	For a third or subsequent conviction of any combination of offenses in this Table in a separate incident within a 3-year period while operating a non-CMV, a CLP or CDL holder must be disqualified from operating a CMV, if the conviction results in the revocation, cancellation, or suspension of the CLP or CDL holder's license or non-CMV driving privileges, for * * *

* * * * *

(d) *Disqualification for railroad-highway grade crossing offenses.* Table 3 to § 383.51 contains a list of the offenses and the periods for which a person who is required to have a CLP or CDL is disqualified, when the driver is operating a CMV at the time of the violation, as follows:

TABLE 3 TO § 383.51

If the driver is convicted of operating a CMV in violation of a Federal, State or local law because * * *	For a first conviction a person required to have a CLP or CDL and a CLP or CDL holder must be disqualified from operating a CMV for * * *	For a second conviction of any combination of offenses in this Table in a separate incident within a 3-year period, a person required to have a CLP or CDL and a CLP or CDL holder must be disqualified from operating a CMV for * * *	For a third or subsequent conviction of any combination of offenses in this Table in a separate incident within a 3-year period, a person required to have a CLP or CDL and a CLP or CDL holder must be disqualified from operating a CMV for * * *

* * * * *

(e) *Disqualification for violating out-of-service orders.* Table 4 to § 383.51 contains a list of the offenses and periods for which a person who is required to have a CLP or CDL is disqualified when the driver is operating a CMV at the time of the violation, as follows:

TABLE 4 TO § 383.51

If the driver operates a CMV and is convicted of * * *	For a first conviction while operating a CMV, a person required to have a CLP or CDL and a CLP or CDL holder must be disqualified from operating a CMV for * * *	For a second conviction in a separate incident within a 10-year period while operating a CMV, a person required to have a CLP or CDL and a CLP or CDL holder must be disqualified from operating a CMV for * * *	For a third or subsequent conviction in a separate incident within a 10-year period while operating a CMV, a person required to have a CLP or CDL and a CLP or CDL holder must be disqualified from operating a CMV for * * *

* * * * *

■ 7. Revise § 383.71 to read as follows:

§ 383.71 Driver application and certification procedures.

(a) *Commercial Learner's Permit.* Prior to obtaining a CLP, a person must meet the following requirements:

(1) *Commercial learner's permit applications submitted prior to July 8, 2014.* CLPs issued prior to July 8, 2014 for limited time periods according to State requirements, shall be considered valid commercial drivers' licenses for purposes of behind-the-wheel training on public roads or highways, if the following minimum conditions are met:

(i) The learner's permit holder is at all times accompanied by the holder of a valid CDL;

(ii) He/she either holds a valid automobile driver's license, or has passed such vision, sign/symbol, and knowledge tests as the State issuing the learner's permit ordinarily administers to applicants for automotive drivers' licenses; and

(iii) He/she does not operate a commercial motor vehicle transporting hazardous materials as defined in § 383.5.

(2) *Commercial learner's permit applications submitted on or after July 8, 2014.* Any person applying for a CLP on or after July 8, 2014 must meet the following conditions:

(i) The person must be 18 years of age or older and provide proof of his/her age.

(ii) The person must have taken and passed a general knowledge test that meets the Federal standards contained in subparts F, G, and H of this part for the commercial motor vehicle group that person operates or expects to operate.

(iii) The person must certify that he/she is not subject to any disqualification under § 383.51, or any license disqualification under State law, and that he/she does not have a driver's license from more than one State or jurisdiction.

(iv) The person must provide to the State of issuance the information required to be included on the CLP as specified in subpart J of this part.

(v) The person must provide to the State proof of citizenship or lawful permanent residency as specified in Table 1 of this section or obtain a Non-domiciled CLP as specified in paragraph (f) of this section.

(vi) The person must provide proof that the State to which application is made is his/her State of domicile, as the term is defined in § 383.5. Acceptable proof of domicile is a document with the person's name and residential address within the State, such as a government issued tax form.

(vii) The person must provide the names of all States where the applicant has been licensed to drive any type of motor vehicle during the previous 10 years.

(viii) A person seeking a passenger (P), school bus (S) or tank vehicle (N) endorsement must have taken and passed the endorsement knowledge test for the specific endorsement.

(ix) The person must provide the State the certification contained in paragraph (b)(1) of this section.

(b) *Initial Commercial Driver's License.* Prior to obtaining a CDL, a person must meet all of the following requirements:

(1)(i) *Initial Commercial Driver's License applications submitted prior to January 30, 2012.* Any person applying for a CDL prior to January 30, 2012, must meet the requirements set forth in paragraphs (b)(2) through (10) of this section, and make the following applicable certification in paragraph (b)(1)(i)(A), (B), or (C) of this section:

(A) A person who operates or expects to operate in interstate or foreign commerce, or is otherwise subject to 49 CFR part 391, must certify that he/she meets the qualification requirements contained in part 391 of this title; or

(B) A person who operates or expects to operate in interstate commerce, but is not subject to part 391 due to an exception under § 390.3(f) or an exemption under § 391.2, must certify that he/she is not subject to part 391.

(C) A person who operates or expects to operate entirely in intrastate commerce and is not subject to part 391, is subject to State driver qualification requirements and must certify that he/she is not subject to part 391.

(ii) *Initial Commercial Driver's License applications submitted on or after January 30, 2012.* Any person applying for a CDL on or after January 30, 2012, must meet the requirements set forth in paragraphs (b)(2) through (10), and (h) of this section, and make one of the following applicable certifications in paragraph (b)(1)(ii)(A), (B), (C), or (D) of this section:

(A*) Non-excepted interstate.* A person must certify that he/she operates or expects to operate in interstate commerce, is both subject to and meets the qualification requirements under 49 CFR part 391, and is required to obtain a medical examiner's certificate by § 391.45 of this chapter;

(B) *Excepted interstate.* A person must certify that he/she operates or expects to operate in interstate commerce, but engages exclusively in transportation or operations excepted under 49 CFR 390.3(f), 391.2, 391.68, or 398.3 from all or parts of the qualification requirements of 49 CFR part 391, and is therefore not required to obtain a medical examiner's certificate by 49 CFR 391.45 of this chapter;

(C) *Non-excepted intrastate.* A person must certify that he/she operates only in intrastate commerce and therefore is subject to State driver qualification requirements; or

(D) *Excepted intrastate.* A person must certify that he/she operates in intrastate commerce, but engages exclusively in transportation or operations excepted from all or parts of the State driver qualification requirements.

(2) The person must pass a driving or skills test in accordance with the standards contained in subparts F, G, and H of this part taken in a motor vehicle that is representative of the type of motor vehicle the person operates or expects to operate; or provide evidence that he/she has successfully passed a driving test administered by an authorized third party.

(3) The person must certify that the motor vehicle in which the person takes the driving skills test is representative of the type of motor vehicle that person operates or expects to operate.

(4) The person must provide the State the information required to be included on the CDL as specified in subpart J of this part.

(5) The person must certify that he/she is not subject to any disqualification under § 383.51, or any license disqualification under State law, and that he/she does not have a driver's license from more than one State or jurisdiction.

(6) The person must surrender his/her non-CDL driver's licenses and CLP to the State.

(7) The person must provide the names of all States where he/she has previously been licensed to drive any type of motor vehicle during the previous 10 years.

(8) If the person is applying for a hazardous materials endorsement, he/she must comply with Transportation Security Administration requirements codified in 49 CFR part 1572. A lawful permanent resident of the United States requesting a hazardous materials endorsement must additionally provide his/her U.S. Citizenship and Immigration Services (USCIS) Alien registration number.

(9) The person must provide proof of citizenship or lawful permanent residency as specified in Table 1 of this section, or be registered under paragraph (f) of this section.

TABLE 1 TO § 383.71—LIST OF ACCEPTABLE PROOFS OF CITIZENSHIP OR LAWFUL PERMANENT RESIDENCY

Status	Proof of status
U.S. Citizen	• Valid, unexpired U.S. Passport. • Certified copy of a birth certificate filed with a State Office of Vital Statistics or equivalent agency in the individual's State of birth, Puerto Rico, the Virgin Islands, Guam, American Samoa or the Commonwealth of the Northern Mariana Islands. • Consular Report of Birth Abroad (CRBA) issued by the U.S. Department of State. • Certificate of Naturalization issued by the U.S. Department of Homeland Security (DHS). • Certificate of Citizenship issued by DHS.
Lawful Permanent Resident	• Valid, unexpired Permanent Resident Card, issued by USCIS or INS.

(10) The person must provide proof that the State to which application is made is his/her State of domicile, as the term is defined in § 383.5. Acceptable proof of domicile is a document with the person's name and residential address within the State, such as a government issued tax form.

(c) *License transfer.* When applying to transfer a CDL from one State of domicile to a new State of domicile, an applicant must apply for a CDL from the new State of domicile within no more than 30 days after establishing his/her new domicile. The applicant must:

(1) Provide to the new State of domicile the certifications contained in paragraphs (b)(1) and (5) of this section;

(2) Provide to the new State of domicile updated information as specified in subpart J of this part;

(3) If the applicant wishes to retain a hazardous materials endorsement, he/she must comply with the requirements specified in paragraph (b)(8) of this section and State requirements as specified in § 383.73(c)(4);

(4) Surrender the CDL from the old State of domicile to the new State of domicile; and

(5) Provide the names of all States where the applicant has previously been licensed to drive any type of motor vehicle during the previous 10 years.

(6) Provide to the State proof of citizenship or lawful permanent residency as specified in Table 1 of this section, or be registered under paragraph (f) of this section.

(7) Provide proof to the State that this is his/her State of domicile, as the term is defined in § 383.5. Acceptable proof of domicile is a document with the person's name and residential address within the State, such as a government issued tax form.

(d) *License renewal.* When applying for a renewal of a CDL, all applicants must:

(1) Provide to the State certifications contained in paragraphs (b)(1) and (5) of this section;

(2) Provide to the State updated information as specified in subpart J of this part; and

(3) If a person wishes to retain a hazardous materials endorsement, he/she must comply with the requirements specified in paragraph (b)(8) of this section and pass the test specified in § 383.121 for such endorsement.

(4) Provide the names of all States where the applicant has previously been licensed to drive any type of motor vehicle during the previous 10 years.

(5) Provide to the State proof of citizenship or lawful permanent residency as specified in Table 1 of this section, or be registered under paragraph (f) of this section.

(6) Provide proof to the State that this is his/her State of domicile, as the term is defined in § 383.5. Acceptable proof of domicile is a document, such as a government issued tax form, with the person's name and residential address within the State.

(e) *License upgrades.* When applying for a CDL or an endorsement

authorizing the operation of a CMV not covered by the current CDL, all applicants must:

(1) Provide the certifications specified in paragraph (b) of this section;

(2) Pass all the knowledge tests in accordance with the standards contained in subparts F, G, and H of this part and all the skills tests specified in paragraph (b)(2) of this section for the new vehicle group and/or different endorsements;

(3) Comply with the requirements specified in paragraph (b)(8) of this section to obtain a hazardous materials endorsement; and

(4) Surrender the previous CDL.

(f) *Non-domiciled CLP and CDL.* (1) A person must obtain a Non-domiciled CLP or CDL:

(i) If the applicant is domiciled in a foreign jurisdiction, as defined in § 383.5, and the Administrator has not determined that the commercial motor vehicle operator testing and licensing standards of that jurisdiction meet the standards contained in subparts G and H of this part.

(ii) If the applicant is domiciled in a State that is prohibited from issuing CLPs and CDLs in accordance with § 384.405 of this subchapter. That person is eligible to obtain a Non-domiciled CLP or CDL from any State that elects to issue a Non-domiciled CLP or CDL and that complies with the testing and licensing standards contained in subparts F, G, and H of this part.

(2) An applicant for a Non-domiciled CLP and CDL must do both of the following:

(i) Complete the requirements to obtain a CLP contained in paragraph (a) of this section or a CDL contained in paragraph (b) of this section. *Exception:* An applicant domiciled in a foreign jurisdiction must provide an unexpired employment authorization document (EAD) issued by USCIS or an unexpired foreign passport accompanied by an approved I–94 form documenting the applicant's most recent admittance into the United States. No proof of domicile is required.

(ii) After receipt of the Non-domiciled CLP or CDL, and for as long as it is valid, notify the State which issued the Non-domiciled CLP or CDL of any adverse action taken by any jurisdiction or governmental agency, foreign or domestic, against his/her driving privileges. Such adverse actions include, but are not be limited to, license disqualification or disqualification from operating a commercial motor vehicle for the convictions described in § 383.51. Notifications must be made within the time periods specified in § 383.33.

(3) An applicant for a Non-domiciled CLP or CDL is not required to surrender his/her foreign license.

(g) Existing CLP and CDL Holder's Self-Certification. Every person who holds a CLP or CDL must provide to the State on or after January 30, 2012, but not later than January 30, 2014, the certification contained in § 383.71(b)(1)(ii).

(h) Medical Certification Documentation Required by the State. An applicant or CLP or CDL holder who certifies to non-excepted, interstate driving operations according to § 383.71(b)(1)(ii)(A) must comply with applicable requirements in paragraphs (h)(1) through (3) of this section:

(1) New CLP and CDL applicants. After January 30, 2012, a new CLP or CDL applicant who certifies that he/she will operate CMVs in non-excepted, interstate commerce must provide the State with an original or copy (as required by the State) of a medical examiner's certificate prepared by a medical examiner, as defined in § 390.5 of this chapter, and the State will post a certification status of "certified" on the Commercial Driver's License Information System (CDLIS) driver record for the driver;

(2) Existing CLP and CDL holders. By January 30, 2014, provide the State with an original or copy (as required by the State) of a current medical examiner's certificate prepared by a medical examiner, as defined in 49 CFR 390.5, and the State will post a certification status of "certified" on CDLIS driver record for the driver. If the non-excepted, interstate CLP or CDL holder fails to provide the State with a current medical examiner's certificate, the State will post a certification status of "not-certified" in the CDLIS driver record for the driver, and initiate a CLP or CDL downgrade following State procedures in accordance with section 383.73(j)(4); and

(3) Maintaining the medical certification status of "certified." In order to maintain a medical certification status of "certified," after January 30, 2012, a CLP or CDL holder who certifies that he/she will operate CMVs in non-excepted, interstate commerce must provide the State with an original or copy (as required by the State) of each subsequently issued medical examiner's certificate.

■ 8. Revise § 383.72 to read as follows:

§ 383.72 Implied consent to alcohol testing.

Any person who holds a CLP or CDL or is required to hold a CLP or CDL is considered to have consented to such testing as is required by any State or jurisdiction in the enforcement of §§ 383.51(b), Table 1, item (4) and 392.5(a)(2) of this subchapter. Consent is implied by driving a commercial motor vehicle.

■ 9. Revise § 383.73 to read as follows:

§ 383.73 State procedures.

(a) *Commercial Learner's Permit.* (1) Prior to July 8, 2014. When issuing a CLP to a person prior to July 8, 2014, a State must meet the requirements in § 383.71(a)(1):

(2) On or after July 8, 2014. Prior to issuing a CLP to a person on or after July 8, 2014, a State must:

(i) Require the applicant to make the certifications, pass the tests, and provide the information as described in § 383.71(a)(2);

(ii) Initiate and complete a check of the applicant's driving record as described in paragraph (b)(3) of this section.

(iii) Make a CLP valid for no more than 180 days from the date of issuance and provide for renewal of a CLP for no more than an additional 180 days without the CLP holder having to retake the general and endorsement knowledge tests;

(iv) Allow only a group-specific passenger (P) and school bus (S) endorsement and tank vehicle (N) endorsement on a CLP, provided the applicant has taken and passed the knowledge test for the specified endorsement. All other Federal endorsements are prohibited on a CLP; and

(v) Complete the Social Security Number verification required by paragraph (g) of this section.

(vi) Require compliance with the standards for providing proof of citizenship or lawful permanent residency specified in § 383.71(b)(9) and proof of State of domicile specified in § 383.71(a)(2)(vi).

(vii) Beginning January 30, 2012, for drivers who certified their type of driving according to § 383.71(b)(1)(ii)(A) (non-excepted interstate) and, if the CLP applicant submits a current medical examiner's certificate, date-stamp the medical examiner's certificate, and post all required information from the medical examiner's certificate to the CDLIS driver record in accordance with paragraph (o) of this section.

(b) *Initial CDL.* Prior to issuing a CDL to a person, a State must:

(1) Require the driver applicant to certify, pass tests, and provide information as described in § 383.71(b);

(2) Check that the vehicle in which the applicant takes his/her test is

representative of the vehicle group the applicant has certified that he/she operates or expects to operate;

(3) Initiate and complete a check of the applicant's driving record to ensure that the person is not subject to any disqualification under § 383.51, or any license disqualification under State law, and that the person does not have a driver's license from more than one State or jurisdiction. The record check must include, but is not limited to, the following:

(i) A check of the applicant's driving record as maintained by his/her current State of licensure, if any;

(ii) A check with the CDLIS to determine whether the driver applicant already has been issued a CDL, whether the applicant's license has been disqualified, or if the applicant has been disqualified from operating a commercial motor vehicle;

(iii) A check with the Problem Driver Pointer System (PDPS) to determine whether the driver applicant has:

(A) Been disqualified from operating a motor vehicle (other than a commercial motor vehicle);

(B) Had a license (other than CDL) disqualified for cause in the 3-year period ending on the date of application; or

(C) Been convicted of any offenses contained in 49 U.S.C. 30304(a)(3);

(iv) A request for the applicant's complete driving record from all States where the applicant was previously licensed over the last 10 years to drive any type of motor vehicle. *Exception:* A State is only required to make the request for the complete driving record specified in this paragraph for initial issuance of a CLP, transfer of CDL from another State or for drivers renewing a CDL for the first time after September 30, 2002, provided a notation is made on the driver's record confirming that the driver record check required by this paragraph has been made and noting the date it was done;

(v) Beginning January 30, 2012, a check that the medical certification status of a driver that self-certified according to § 383.71(b)(1)(ii)(A) of this chapter (non-excepted interstate) is "certified;"

(4) Require the driver applicant to surrender his/her non-CDL driver's license and CLP;

(5) Beginning January 30, 2012, for drivers who certified their type of driving according to § 383.71(b)(1)(ii)(A) (non-excepted interstate) and, if the CDL driver submits a current medical examiner's certificate, date-stamp the medical examiner's certificate, and post all required information from the medical examiner's certificate to the CDLIS driver record in accordance with paragraph (o) of this section.

(6) Require compliance with the standards for providing proof of citizenship or lawful permanent residency specified in § 383.71(b)(9) and proof of State of domicile specified in § 383.71(b)(10). *Exception:* A State is only required to check the proof of citizenship or legal presence specified in this paragraph for initial issuance of a CLP or Non-domiciled CDL, transfer of CDL from another State or for drivers renewing a CDL or Non-domiciled CDL for the first time after July 8, 2011, provided a notation is made on the driver's record confirming that the proof of citizenship or legal presence check required by this paragraph has been made and noting the date it was done;

(7) If not previously done, complete the Social Security Number verification required by paragraph (g) of this section;

(8) For persons applying for a hazardous materials endorsement, require compliance with the standards for such endorsement specified in §§ 383.71(b)(8) and 383.141; and

(9) Make the CDL valid for no more than 8 years from the date of issuance.

(c) *License transfers.* Prior to issuing a CDL to a person who has a CDL from another State, a State must:

(1) Require the driver applicant to make the certifications contained in § 383.71(b)(1) and (5);

(2) Complete a check of the driver applicant's record as contained in paragraph (b)(3) of this section;

(3) Request and receive updates of information specified in subpart J of this part;

(4) If such applicant wishes to retain a hazardous materials endorsement, require compliance with standards for such endorsement specified in §§ 383.71(b)(8) and 383.141 and ensure that the driver has, within the 2 years preceding the transfer, either:

(i) Passed the test for such endorsement specified in § 383.121; or

(ii) Successfully completed a hazardous materials test or training that is given by a third party and that is deemed by the State to substantially cover the same knowledge base as that described in § 383.121;

(5) If not previously done, complete the Social Security Number verification required by paragraph (g) of this section;

(6) Require the applicant to surrender the CDL issued by the applicant's previous State of domicile;

(7) Require compliance with the standards for providing proof of citizenship or lawful permanent residency specified in § 383.71(b)(9) and proof of State of domicile specified in § 383.71(b)(10). *Exception:* A State is only required to check the proof of citizenship or legal presence specified in this paragraph for initial issuance of a CLP or Non-domiciled CDL, transfer of CDL from another State or for drivers renewing a CDL or Non-domiciled CDL for the first time after July 8, 2011, provided a notation is made on the driver's record confirming that the proof of citizenship or legal presence check required by this paragraph has been made and noting the date it was done;

(8) Beginning January 30, 2012, verify from the CDLIS driver record that the medical certification status of driver is "certified" for those who certified according to § 383.71(b)(1)(ii)(A). *Exception:* A driver who certified according to § 383.71(b)(1)(ii)(A) that he/she plans to operate in non-excepted interstate commerce may present a current medical examiner's certificate issued prior to January 30, 2012. The medical examiner's certificate provided by the driver must be posted to the CDLIS driver record in accordance with paragraph (o) of this section and:

(9) Make the CDL valid for no more than 8 years from the date of issuance.

(d) *License Renewals.* Prior to renewing any CDL a State must:

(1) Require the driver applicant to make the certifications contained in § 383.71(b);

(2) Complete a check of the driver applicant's record as contained in paragraph (b)(3) of this section;

(3) Request and receive updates of information specified in subpart J of this part;

(4) If such applicant wishes to retain a hazardous materials endorsement, require the driver to pass the test specified in § 383.121 and comply with the standards specified in §§ 383.71(b)(8) and 383.141 for such endorsement;

(5) If not previously done, complete the Social Security Number verification required by paragraph (g) of this section;

(6) Make the renewal of the CDL valid for no more than 8 years from the date of issuance;

(7) Require compliance with the standards for providing proof of citizenship or lawful permanent residency specified in § 383.71(b)(9) and proof of State of domicile specified in § 383.71(b)(10); and

(8) Beginning January 30, 2012, verify from the CDLIS driver record that the medical certification status is "certified" for drivers who self-certified according to § 383.71(b)(1)(ii)(A). *Exception:* A driver who certified according to § 383.71(b)(1)(ii)(A) may present a current medical examiner's certificate issued prior to January 30, 2012. The medical examiner's certificate provided

by the driver must be posted to the CDLIS driver record in accordance with paragraph (o) of this section.

(e) *License upgrades.* Prior to issuing an upgrade of a CDL, a State must:

(1) Require such driver applicant to provide certifications, pass tests, and meet applicable hazardous materials standards specified in § 383.71(e);

(2) Complete a check of the driver applicant's record as described in paragraph (b)(3) of this section;

(3) If not previously done, complete the Social Security Number verification required by paragraph (g) of this section;

(4) Require the driver applicant to surrender his/her previous CDL;

(5) Require compliance with the standards for providing proof of citizenship or lawful permanent residency specified in § 383.71(b)(9) and proof of State of domicile specified in § 383.71(b)(10);

(6) Beginning January 30, 2012, verify from the CDLIS driver record that the medical certification status is "certified" for drivers who self-certified according to § 383.71(b)(1)(ii)(A). *Exception:* A driver who certified according to § 383.71(b)(1)(ii)(A) may present a current medical examiner's certificate issued prior to January 30, 2012. The medical examiner's certificate provided by the driver must be posted to the CDLIS driver record in accordance with paragraph (o) of this section and:

(7) Make the CDL valid for no more than 8 years from the date of issuance.

(f) *Non-domiciled CLP and CDL.* (1) A State may only issue a Non-domiciled CLP or CDL to a person who meets one of the circumstances described in § 383.71(f)(1).

(2) State procedures for the issuance of a non-domiciled CLP and CDL, for any modifications thereto, and for notifications to the CDLIS must at a minimum be identical to those pertaining to any other CLP or CDL, with the following exceptions:

(i) If the applicant is requesting a transfer of his/her Non-domiciled CDL, the State must obtain the Non-domiciled CDL currently held by the applicant and issued by another State;

(ii) The State must add the word "non-domiciled" to the face of the CLP or CDL, in accordance with § 383.153(b); and

(iii) The State must have established, prior to issuing any Non-domiciled CLP or CDL, the practical capability of disqualifying the holder of any Non-domiciled CLP or CDL, by withdrawing or disqualifying his/her Non-domiciled CLP or CDL as if the Non-domiciled CLP or CDL were a CLP or CDL issued to a person domiciled in the State.

(3) The State must require compliance with the standards for providing proof of legal presence specified in § 383.71(b)(9) and § 383.71(f)(2)(i).

(g) *Social Security Number verification.* (1) Prior to issuing a CLP or a CDL to a person the State must verify the name, date of birth, and Social Security Number provided by the applicant with the information on file with the Social Security Administration. The State is prohibited from issuing, renewing, upgrading, or transferring a CLP or CDL if the Social Security Administration database does not match the applicant-provided data.

(2) *Exception.* A State is only required to perform the Social Security Number verification specified in this paragraph for initial issuance of a CLP, transfer of CDL from another State or for drivers renewing a CDL for the first time after July 8, 2011 who have not previously had their Social Security Number information verified, provided a notation is made on the driver's record confirming that the verification required by this paragraph has been made and noting the date it was done.

(h) *License issuance.* After the State has completed the procedures described in paragraphs (a) through (g) of this section, as applicable, it may issue a CLP or CDL to the driver applicant. The State must notify the operator of the CDLIS of such issuance, transfer, renewal, or upgrade within the 10-day period beginning on the date of license issuance.

(i) *Surrender procedure.* A State may return a surrendered license to a driver after physically marking it so that it cannot be mistaken for a valid document. Simply punching a hole in the expiration date of the document is insufficient. A document perforated with the word "VOID" is considered invalidated.

(j) *Penalties for false information.* If a State determines, in its check of an applicant's license status and record prior to issuing a CLP or CDL, or at any time after the CLP or CDL is issued, that the applicant has falsified information contained in subpart J of this part, in any of the certifications required in § 383.71(b) or (g), or in any of the documents required to be submitted by § 383.71(h), the State must at a minimum disqualify the person's CLP or CDL or his/her pending application, or disqualify the person from operating a commercial motor vehicle for a period of at least 60 consecutive days.

(k) *Drivers convicted of fraud related to the testing and issuance of a CLP or CDL.* (1) The State must have policies in effect that result, at a minimum, in the disqualification of the CLP or CDL of a person who has been convicted of fraud related to the issuance of that CLP or CDL. The application of a person so convicted who seeks to renew, transfer, or upgrade the fraudulently obtained CLP or CDL must also, at a minimum, be disqualified. The State must record any such withdrawal in the person's driving record. The person may not reapply for a new CDL for at least 1 year.

(2) If a State receives credible information that a CLP- or CDL-holder is suspected, but has not been convicted, of fraud related to the issuance of his/her CLP or CDL, the State must require the driver to re-take the skills and/or knowledge tests. Within 30 days of receiving notification from the State that re-testing is necessary, the affected CLP- or CDL-holder must make an appointment or otherwise schedule to take the next available test. If the CLP- or CDL-holder fails to make an appointment within 30 days, the State must disqualify his/her CLP or CDL. If the driver fails either the knowledge or skills test or does not take the test, the State must disqualify his/her CLP or CDL. Once a CLP- or CDL-holder's CLP or CDL has been disqualified, he/she must reapply for a CLP or CDL under State procedures applicable to all CLP and CDL applicants.

(l) *Reciprocity.* A State must allow any person who has a valid CLP, CDL, Non-domiciled CLP, or Non-domiciled CDL and who is not disqualified from operating a CMV, to operate a CMV in the State.

(m) *Document verification.* The State must require at least two persons within the driver licensing agency to check and verify all documents involved in the licensing process for the initial issuance, renewal, upgrade, or transfer of a CLP or CDL. The documents being checked and verified must include, at a minimum, those provided by the applicant to prove legal presence and domicile, the information filled out on the application form, and knowledge and skills test scores. *Exception:* For offices with only one staff member, the documents must be checked and verified by a supervisor before issuance or, when a supervisor is not available, copies must be made of the documents used to prove legal presence and domicile and a supervisor must verify the documents and the filled out application form and test scores within one business day of issuance of the CLP or CDL.

(n) *Computer system controls.* The State must establish computer system controls that will:

(1) Prevent the issuance of an initial, renewed, upgraded, or transferred CLP or CDL when the results of transactions indicate the applicant is unqualified. These controls, at a minimum, must be established for the following transactions: State, CDLIS, and PDPS driver record checks; Social Security Number verification; and knowledge and skills test scores verification.

(2) Suspend the issuance process whenever State, CDLIS, and/or PDPS driver record checks return suspect results. The State must demonstrate that it has a system to detect and prevent fraud when a driver record check returns suspect results. At a minimum, the system must ensure that:

(i) The results are not connected to a violation of any State or local law relating to motor vehicle traffic control (other than parking, vehicle weight, or vehicle defect violations);

(ii) The name of the persons performing the record check and authorizing the issuance, and the justification for the authorization are documented by the State; and

(iii) The person performing the record check and the person authorizing the issuance are not the same.

(o) *Medical recordkeeping.* (1) *Status of CDL holder.* Beginning January 30, 2012, for each operator of a commercial motor vehicle required to have a CLP or CDL, the current licensing State must:

(i) Post the driver's self-certification of type of driving under § 383.71(b)(1)(ii),

(ii) Retain the original or a copy of the medical certificate of any driver required to provide documentation of physical qualification for 3 years beyond the date the certificate was issued, and

(iii) Post the information from the medical examiner's certificate within 10 calendar days to the CDLIS driver record, including:

(A) Medical examiner's name;

(B) Medical examiner's telephone number;

(C) Date of medical examiner's certificate issuance;

(D) Medical examiner's license number and the State that issued it;

(E) Medical examiner's National Registry identification number (if the National Registry of Medical Examiners, mandated by 49 U.S.C. 31149(d), requires one);

(F) The indicator of medical certification status, i.e., "certified" or "not-certified";

(G) Expiration date of the medical examiner's certificate;

(H) Existence of any medical variance on the medical certificate, such as an exemption, Skill Performance Evaluation (SPE) certification, or grandfather provisions;

(I) Any restrictions (e.g., corrective lenses, hearing aid, required to have possession of an exemption letter or SPE certificate while on-duty, etc.); and

(J) Date the medical examiner's certificate information was posted to the CDLIS driver record.

(2) *Status update.* Beginning January 30, 2012, the State must, within 10 calendar days of the driver's medical certification status expiring or a medical variance expiring or being rescinded, update the medical certification status of that driver as "not-certified."

(3) *Variance update.* Beginning January 30, 2012, within 10 calendar days of receiving information from FMCSA regarding issuance or renewal of a medical variance for a driver, the State must update the CDLIS driver record to include the medical variance information provided by FMCSA.

(4) *Downgrade.* (i) Beginning January 30, 2012, if a driver's medical certification or medical variance expires, or FMCSA notifies the State that a medical variance was removed or rescinded, the State must:

(A) Notify the CLP or CDL holder of his/her CLP or CDL "not-certified" medical certification status and that the CMV privileges will be removed from the CLP or CDL unless the driver submits a current medical certificate and/or medical variance, or changes his/her self-certification to driving only in excepted or intrastate commerce (if permitted by the State);

(B) Initiate established State procedures for downgrading the CLP or CDL. The CLP or CDL downgrade must be completed and recorded within 60 days of the driver's medical certification status becoming "not-certified" to operate a CMV.

(ii) Beginning January 30, 2014, if a driver fails to provide the State with the certification contained in § 383.71(b)(1)(ii), or a current medical examiner's certificate if the driver self-certifies according to § 383.71(b)(1)(ii)(A) that he/she is operating in non-excepted interstate commerce as required by § 383.71(h), the State must mark that CDLIS driver record as "not-certified" and initiate a CLP or CDL downgrade following State procedures in accordance with paragraph (o)(4)(i)(B) of this section.

(5) FMCSA Medical Programs is designated as the keeper of the list of State contacts for receiving medical variance information from FMCSA. Beginning January 30, 2012, States are responsible for insuring their medical variance contact information is always up-to-date with FMCSA's Medical Programs.

■ 10. Revise § 383.75 to read as follows:

§ 383.75 Third party testing.

(a) *Third party tests.* A State may authorize a third party tester to administer the skills tests as specified in subparts G and H of this part, if the following conditions are met:

(1) The skills tests given by the third party are the same as those that would otherwise be given by the State using the same version of the skills tests, the same written instructions for test applicants, and the same scoring sheets as those prescribed in subparts G and H of this part;

(2) The State must conduct an on-site inspection of each third party tester at least once every 2 years, with a focus on examiners with irregular results such as unusually high or low pass/fail rates;

(3) The State must issue the third party tester a CDL skills testing certificate upon the execution of a third party skills testing agreement.

(4) The State must issue each third party CDL skills test examiner a skills testing certificate upon successful completion of a formal skills test examiner training course prescribed in § 384.228.

(5) The State must, at least once every 2 years, do one of the following for each third party examiner:

(i) Have State employees covertly take the tests administered by the third party as if the State employee were a test applicant;

(ii) Have State employees co-score along with the third party examiner during CDL skills tests to compare pass/fail results; or

(iii) Re-test a sample of drivers who were examined by the third party to compare pass/fail results;

(6) The State must take prompt and appropriate remedial action against a third party tester that fails to comply with State or Federal standards for the CDL testing program, or with any other terms of the third party contract;

(7) A skills tester that is also a driver training school is prohibited from administering a skills test to an applicant who was trained by that training school. *Exception:* When the nearest alternative third party tester or State skills testing facility is over 50 miles from the training school, the SDLA may allow the training school to skills test the applicant it trained provided the individual skills test examiner did not train the applicant; and

(8) The State has an agreement with the third party containing, at a minimum, provisions that:

(i) Allow the FMCSA, or its representative, and the State to conduct

random examinations, inspections, and audits of its records, facilities, and operations without prior notice;

(ii) Require that all third party skills test examiners meet the qualification and training standards of § 384.228;

(iii) Allow the State to do any of the following:

(A) Have State employees covertly take the tests administered by the third party as if the State employee were a test applicant;

(B) Have State employees co-score along with the third party examiner during CDL skills tests to compare pass/fail results; or

(C) Have the State re-test a sample of drivers who were examined by the third party;

(iv) Reserve unto the State the right to take prompt and appropriate remedial action against a third party tester that fails to comply with State or Federal standards for the CDL testing program, or with any other terms of the third party contract;

(v) Require the third party tester to initiate and maintain a bond in an amount determined by the State to be sufficient to pay for re-testing drivers in the event that the third party or one or more of its examiners is involved in fraudulent activities related to conducting skills testing for applicants for a CDL.

(vi) Require the third party tester to use only CDL skills examiners who have successfully completed a formal CDL skills test examiner training course as prescribed by the State and have been certified by the State as a CDL skills examiner qualified to administer CDL skills tests;

(vii) Require the third party tester to use designated road test routes that have been approved by the State;

(viii) Require the third party tester to submit a schedule of CDL skills testing appointments to the State no later than two business days prior to each test; and

(ix) Require the third party tester to maintain copies of the following records at its principal place of business:

(A) A copy of the State certificate authorizing the third party tester to administer a CDL skills testing program for the classes and types of commercial motor vehicles listed;

(B) A copy of each third party examiner's State certificate authorizing the third party examiner to administer CDL skills tests for the classes and types of commercial motor vehicles listed;

(C) A copy of the current third party agreement;

(D) A copy of each completed CDL skills test scoring sheet for the current year and the past two calendar years;

(E) A copy of the third party tester's State-approved road test route(s); and

(F) A copy of each third party examiner's training record.

(b) *Proof of testing by a third party.* The third party tester must notify the State driver licensing agency through secure electronic means when a driver applicant passes skills tests administered by the third party tester.

(c) *Minimum number of tests conducted.*

The State must revoke the skills testing certification of any examiner who does not conduct skills test examinations of at least 10 different applicants per calendar year. *Exception:* Examiners who do not meet the 10-test minimum must either take the refresher training specified in § 384.228 of this chapter or have a State examiner ride along to observe the third party examiner successfully administer at least one skills test.

■ 11. Revise § 383.77 to read as follows:

§ 383.77 Substitute for driving skills tests for drivers with military CMV experience.

At the discretion of a State, the driving skills test as specified in § 383.113 may be waived for a CMV driver with military CMV experience who is currently licensed at the time of his/her application for a CDL, and substituted with an applicant's driving record in combination with certain driving experience. The State shall impose conditions and limitations to restrict the applicants from whom a State may accept alternative requirements for the skills test described in § 383.113. Such conditions must require at least the following:

(a) An applicant must certify that, during the two-year period immediately prior to applying for a CDL, he/she:

(1) Has not had more than one license (except for a military license);

(2) Has not had any license suspended, revoked, or cancelled;

(3) Has not had any convictions for any type of motor vehicle for the disqualifying offenses contained in § 383.51(b);

(4) Has not had more than one conviction for any type of motor vehicle for serious traffic violations contained in § 383.51(c); and

(5) Has not had had any conviction for a violation of military, State or local law relating to motor vehicle traffic control (other than a parking violation) arising in connection with any traffic accident, and has no record of an accident in which he/she was at fault; and

(b) An applicant must provide evidence and certify that he/she:

(1) Is regularly employed or was regularly employed within the last 90 days in a military position requiring operation of a CMV;

(2) Was exempted from the CDL requirements in § 383.3(c); and

(3) Was operating a vehicle representative of the CMV the driver applicant operates or expects to operate, for at least the 2 years immediately preceding discharge from the military.

■ 12. Add § 383.79 to subpart E to read as follows:

§ 383.79 Skills testing of out-of-State students.

(a) A State may administer its skills test, in accordance with subparts F, G, and H of this part, to a person who has taken training in that State and is to be licensed in another United States jurisdiction (i.e., his/her State of domicile). Such test results must be transmitted electronically directly from the testing State to the licensing State in an efficient and secure manner.

(b) The State of domicile of a CDL applicant must accept the results of a skills test administered to the applicant by any other State, in accordance with subparts F, G, and H of this part, in fulfillment of the applicant's testing requirements under § 383.71, and the State's test administration requirements under § 383.73.

■ 13. Amend § 383.93 by revising paragraph (a) to read as follows:

§ 383.93 Endorsements.

(a) *General.* (1) In addition to passing the knowledge and skills tests described in subpart G of this part, all persons who operate or expect to operate the type(s) of motor vehicles described in paragraph (b) of this section must pass specialized tests to obtain each endorsement. The State shall issue CDL endorsements only to drivers who successfully complete the tests.

(2) The only endorsements allowed on a CLP are the following:

(i) Passenger (P);

(ii) School bus (S); and

(iii) Tank vehicle (N).

(3) The State must use the codes listed in § 383.153 when placing endorsements on a CLP or CDL.

* * * * *

■ 14. Revise § 383.95 to read as follows:

§ 383.95 Restrictions.

(a) *Air brake.* (1) If an applicant either fails the air brake component of the knowledge test, or performs the skills test in a vehicle not equipped with air brakes, the State must indicate on the CLP or CDL, if issued, that the person is restricted from operating a CMV equipped with any type of air brakes.

(2) For the purposes of the skills test and the restriction, air brakes include

any braking system operating fully or partially on the air brake principle.

(b) *Full air brake.* (1) If an applicant performs the skills test in a vehicle equipped with air over hydraulic brakes, the State must indicate on the CDL, if issued, that the person is restricted from operating a CMV equipped with any braking system operating fully on the air brake principle.

(2) For the purposes of the skills test and the restriction, air over hydraulic brakes includes any braking system operating partially on the air brake and partially on the hydraulic brake principle.

(c) *Manual transmission.* (1) If an applicant performs the skills test in a vehicle equipped with an automatic transmission, the State must indicate on the CDL, if issued, that the person is restricted from operating a CMV equipped with a manual transmission.

(2) For the purposes of the skills test and the restriction, an automatic transmission includes any transmission other than a manual transmission as defined in § 383.5.

(d) *Tractor-trailer.* If an applicant performs the skills test in a combination vehicle for a Group A CDL with the power unit and towed unit connected with a pintle hook or other non-fifth wheel connection, the State must indicate on the CDL, if issued, that the person is restricted from operating a tractor-trailer combination connected by a fifth wheel that requires a Group A CDL.

(e) *Group A passenger vehicle.* If an applicant applying for a passenger endorsement performs the skills test in a passenger vehicle requiring a Group B CDL, the State must indicate on the CDL, if issued, that the person is restricted from operating a passenger vehicle requiring a Group A CDL.

(f) *Group A and B passenger vehicle.* If an applicant applying for a passenger endorsement performs the skills test in a passenger vehicle requiring a Group C CDL, the State must indicate on the CDL, if issued, that the person is restricted from operating a passenger vehicle requiring a Group A or B CDL.

(g) *Medical Variance Restrictions.* If the State is notified according to § 383.73(o)(3) that the driver has been issued a medical variance, the State must indicate the existence of such a medical variance on the CDLIS driver record and the CDL document, if issued, using the restriction code "V" to indicate there is information about a medical variance on the CDLIS driver record.

Note: In accordance with the agreement between Canada and the United States (see footnote to § 391.41 of this chapter), drivers with a medical variance restriction code on their CDL are restricted from operating a CMV in the other country.

■ 15. Revise § 383.110 to read as follows:

§ 383.110 General requirement.

All drivers of CMVs must have the knowledge and skills necessary to operate a CMV safely as contained in this subpart. The specific types of items that a State must include in the knowledge and skills tests that it administers to CDL applicants are included in this subpart.

■ 16. Revise § 383.111 to read as follows:

§ 383.111 Required knowledge.

(a) All CMV operators must have knowledge of the following 20 general areas:

(1) *Safe operations regulations.* Driver-related elements of the regulations contained in parts 391, 392, 393, 395, 396, and 397 of this subchapter, such as:

(i) Motor vehicle inspection, repair, and maintenance requirements;

(ii) Procedures for safe vehicle operations;

(iii) The effects of fatigue, poor vision, hearing impairment, and general health upon safe commercial motor vehicle operation;

(iv) The types of motor vehicles and cargoes subject to the requirements contained in part 397 of this subchapter; and

(v) The effects of alcohol and drug use upon safe commercial motor vehicle operations.

(2) *Safe vehicle control systems.* The purpose and function of the controls and instruments commonly found on CMVs.

(3) *CMV safety control systems.* (i) Proper use of the motor vehicle's safety system, including lights, horns, side and rear-view mirrors, proper mirror adjustments, fire extinguishers, symptoms of improper operation revealed through instruments, motor vehicle operation characteristics, and diagnosing malfunctions.

(ii) CMV drivers must have knowledge of the correct procedures needed to use these safety systems in an emergency situation, e.g., skids and loss of brakes.

(4) *Basic control.* The proper procedures for performing various basic maneuvers, including:

(i) Starting, warming up, and shutting down the engine;

(ii) Putting the vehicle in motion and stopping;

(iii) Backing in a straight line; and

(iv) Turning the vehicle, e.g., basic rules, off tracking, right/left turns and right curves.

(5) *Shifting.* The basic shifting rules and terms for common transmissions, including:

(i) Key elements of shifting, e.g., controls, when to shift, and double clutching;

(ii) Shift patterns and procedures; and

(iii) Consequences of improper shifting.

(6) *Backing.* The procedures and rules for various backing maneuvers, including:

(i) Backing principles and rules; and

(ii) Basic backing maneuvers, e.g., straight-line backing, and backing on a curved path.

(7) *Visual search.* The importance of proper visual search, and proper visual search methods, including:

(i) Seeing ahead and to the sides;

(ii) Use of mirrors; and

(iii) Seeing to the rear.

(8) *Communication.* The principles and procedures for proper communications and the hazards of failure to signal properly, including:

(i) Signaling intent, e.g., signaling when changing direction in traffic;

(ii) Communicating presence, e.g., using horn or lights to signal presence; and

(iii) Misuse of communications.

(9) *Speed management.* The importance of understanding the effects of speed, including:

(i) Speed and stopping distance;

(ii) Speed and surface conditions;

(iii) Speed and the shape of the road;

(iv) Speed and visibility; and

(v) Speed and traffic flow.

(10) *Space management.* The procedures and techniques for controlling the space around the vehicle, including:

(i) The importance of space management;

(ii) Space cushions, e.g., controlling space ahead/to the rear;

(iii) Space to the sides; and

(iv) Space for traffic gaps.

(11) *Night operation.* Preparations and procedures for night driving, including:

(i) Night driving factors, e.g., driver factors (vision, glare, fatigue, inexperience);

(ii) Roadway factors (low illumination, variation in illumination, unfamiliarity with roads, other road users, especially drivers exhibiting erratic or improper driving); and

(iii) Vehicle factors (headlights, auxiliary lights, turn signals, windshields and mirrors).

(12) *Extreme driving conditions.* The basic information on operating in

extreme driving conditions and the hazards encountered in such conditions, including:

(i) Bad weather, e.g., snow, ice, sleet, high wind;

(ii) Hot weather; and

(iii) Mountain driving.

(13) *Hazard perceptions.* The basic information on hazard perception and clues for recognition of hazards, including:

(i) Road characteristics; and

(ii) Road user activities.

(14) *Emergency maneuvers.* The basic information concerning when and how to make emergency maneuvers, including:

(i) Evasive steering;

(ii) Emergency stop;

(iii) Off road recovery;

(iv) Brake failure; and

(v) Blowouts.

(15) *Skid control and recovery.* The information on the causes and major types of skids, as well as the procedures for recovering from skids.

(16) *Relationship of cargo to vehicle control.* The principles and procedures for the proper handling of cargo, including:

(i) Consequences of improperly secured cargo, drivers' responsibilities, and Federal/State and local regulations;

(ii) Principles of weight distribution; and

(iii) Principles and methods of cargo securement.

(17) *Vehicle inspections.* The objectives and proper procedures for performing vehicle safety inspections, as follows:

(i) The importance of periodic inspection and repair to vehicle safety.

(ii) The effect of undiscovered malfunctions upon safety.

(iii) What safety-related parts to look for when inspecting vehicles, e.g., fluid leaks, interference with visibility, bad tires, wheel and rim defects, braking system defects, steering system defects, suspension system defects, exhaust system defects, coupling system defects, and cargo problems.

(iv) Pre-trip/enroute/post-trip inspection procedures.

(v) Reporting findings.

(18) *Hazardous materials.* Knowledge of the following:

(i) What constitutes hazardous material requiring an endorsement to transport;

(ii) Classes of hazardous materials;

(iii) Labeling/placarding requirements; and

(iv) Need for specialized training as a prerequisite to receiving the endorsement and transporting hazardous cargoes.

(19) *Mountain driving.* Practices that are important when driving upgrade and downgrade, including:

(i) Selecting a safe speed;

(ii) Selecting the right gear; and

(iii) Proper braking techniques.

(20) *Fatigue and awareness.* Practices that are important to staying alert and safe while driving, including;

(i) Being prepared to drive;

(ii) What to do when driving to avoid fatigue;

(iii) What to do when sleepy while driving; and

(iv) What to do when becoming ill while driving.

(b) *Air brakes.* All CMV drivers operating vehicles equipped with air brakes must have knowledge of the following 7 areas:

(1) General air brake system nomenclature;

(2) The dangers of contaminated air supply (dirt, moisture, and oil);

(3) Implications of severed or disconnected air lines between the power unit and the trailer(s);

(4) Implications of low air pressure readings;

(5) Procedures to conduct safe and accurate pre-trip inspections, including knowledge about:

(i) Automatic fail-safe devices;

(ii) System monitoring devices; and

(iii) Low pressure warning alarms.

(6) Procedures for conducting en route and post-trip inspections of air-actuated brake systems, including:

(i) Ability to detect defects that may cause the system to fail;

(ii) Tests that indicate the amount of air loss from the braking system within a specified period, with and without the engine running; and

(iii) Tests that indicate the pressure levels at which the low air pressure warning devices and the tractor protection valve should activate.

(7) General operating practices and procedures, including:

(i) Proper braking techniques;

(ii) Antilock brakes;

(iii) Emergency stops; and

(iv) Parking brake.

(c) *Combination vehicles.* All CMV drivers operating combination vehicles must have knowledge of the following 3 areas:

(1) Coupling and uncoupling—The procedures for proper coupling and uncoupling a tractor to a semi-trailer;

(2) Vehicle inspection—The objectives and proper procedures that are unique for performing vehicle safety inspections on combination vehicles; and

(3) General operating practices and procedures, including:

(i) Safely operating combination vehicles; and

(ii) Air brakes.

■ 17. Revise § 383.113 to read as follows:

§ 383.113 Required skills.

(a) *Pre-trip vehicle inspection skills.* Applicants for a CDL must possess the following basic pre-trip vehicle inspection skills for the vehicle class that the driver operates or expects to operate:

(1) *All test vehicles.* Applicants must be able to identify each safety-related part on the vehicle and explain what needs to be inspected to ensure a safe operating condition of each part, including:

(i) Engine compartment;

(ii) Cab/engine start;

(iii) Steering;

(iv) Suspension;

(v) Brakes;

(vi) Wheels;

(vii) Side of vehicle;

(viii) Rear of vehicle; and

(ix) Special features of tractor trailer, school bus, or coach/transit bus, if this type of vehicle is being used for the test.

(2) *Air brake equipped test vehicles.* Applicants must demonstrate the following skills with respect to inspection and operation of air brakes:

(i) Locate and verbally identify air brake operating controls and monitoring devices;

(ii) Determine the motor vehicle's brake system condition for proper adjustments and that air system connections between motor vehicles have been properly made and secured;

(iii) Inspect the low pressure warning device(s) to ensure that they will activate in emergency situations;

(iv) With the engine running, make sure that the system maintains an adequate supply of compressed air;

(v) Determine that required minimum air pressure build up time is within acceptable limits and that required alarms and emergency devices automatically deactivate at the proper pressure level; and

(vi) Operationally check the brake system for proper performance.

(b) *Basic vehicle control skills.* All applicants for a CDL must possess and demonstrate the following basic motor vehicle control skills for the vehicle class that the driver operates or expects to operate:

(1) Ability to start, warm up, and shut down the engine;

(2) Ability to put the motor vehicle in motion and accelerate smoothly, forward and backward;

(3) Ability to bring the motor vehicle to a smooth stop;

(4) Ability to back the motor vehicle in a straight line, and check path and clearance while backing;

(5) Ability to position the motor vehicle to negotiate safely and then make left and right turns;

(6) Ability to shift as required and select appropriate gear for speed and highway conditions; and

(7) Ability to back along a curved path.

(c) *Safe on-road driving skills.* All applicants for a CDL must possess and demonstrate the following safe on-road driving skills for their vehicle class:

(1) Ability to use proper visual search methods;

(2) Ability to signal appropriately when changing direction in traffic;

(3) Ability to adjust speed to the configuration and condition of the roadway, weather and visibility conditions, traffic conditions, and motor vehicle, cargo and driver conditions;

(4) Ability to choose a safe gap for changing lanes, passing other vehicles, as well as for crossing or entering traffic;

(5) Ability to position the motor vehicle correctly before and during a turn to prevent other vehicles from passing on the wrong side, as well as to prevent problems caused by off-tracking;

(6) Ability to maintain a safe following distance depending on the condition of the road, visibility, and vehicle weight;

(7) Ability to adjust operation of the motor vehicle to prevailing weather conditions including speed selection, braking, direction changes, and following distance to maintain control; and

(8) Ability to observe the road and the behavior of other motor vehicles, particularly before changing speed and direction.

(d) *Test area.* Skills tests shall be conducted in on-street conditions or under a combination of on-street and off-street conditions.

(e) *Simulation technology.* A State may utilize simulators to perform skills testing, but under no circumstances as a substitute for the required testing in on-street conditions.

■ 18. Revise § 383.115 to read as follows:

§ 383.115 Requirements for double/triple trailers endorsement.

In order to obtain a double/triple trailers endorsement each applicant must have knowledge covering:

(a) Procedures for assembly and hookup of the units;

(b) Proper placement of heaviest trailer;

(c) Handling and stability characteristics including off-tracking, response to steering, sensory feedback, braking, oscillatory sway, rollover in steady turns, and yaw stability in steady turns;

(d) Potential problems in traffic operations, including problems the motor vehicle creates for other motorists due to slower speeds on steep grades, longer passing times, possibility for blocking entry of other motor vehicles on freeways, splash and spray impacts, aerodynamic buffeting, view blockages, and lateral placement; and

(e) Operating practices and procedures not otherwise specified.

■ 19. Revise § 383.117 to read as follows:

§ 383.117 Requirements for passenger endorsement.

An applicant for the passenger endorsement must satisfy both of the following additional knowledge and skills test requirements.

(a) *Knowledge test.* All applicants for the passenger endorsement must have knowledge covering the following topics:

(1) Proper procedures for loading/unloading passengers;

(2) Proper use of emergency exits, including push-out windows;

(3) Proper responses to such emergency situations as fires and unruly passengers;

(4) Proper procedures at railroad-highway grade crossings and drawbridges;

(5) Proper braking procedures; and

(6) Operating practices and procedures not otherwise specified.

(b) *Skills test.* To obtain a passenger endorsement applicable to a specific vehicle class, an applicant must take his/her skills test in a passenger vehicle satisfying the requirements of that vehicle group as defined in § 383.91.

■ 20. Revise § 383.119 to read as follows:

§ 383.119 Requirements for tank vehicle endorsement.

In order to obtain a tank vehicle endorsement, each applicant must have knowledge covering the following:

(a) Causes, prevention, and effects of cargo surge on motor vehicle handling;

(b) Proper braking procedures for the motor vehicle when it is empty, full, and partially full;

(c) Differences in handling of baffled/compartmented tank interiors versus non-baffled motor vehicles;

(d) Differences in tank vehicle type and construction;

(e) Differences in cargo surge for liquids of varying product densities;

(f) Effects of road grade and curvature on motor vehicle handling with filled, half-filled, and empty tanks;

(g) Proper use of emergency systems;

(h) For drivers of DOT specification tank vehicles, retest and marking requirements; and

(i) Operating practices and procedures not otherwise specified.

■ 21. Revise § 383.121 to read as follows:

§ 383.121 Requirements for hazardous materials endorsement.

In order to obtain a hazardous materials endorsement, each applicant must have such knowledge as is required of a driver of a hazardous materials laden vehicle, from information contained in 49 CFR parts 171, 172, 173, 177, 178, and 397, on the following:

(a) Hazardous materials regulations including:

(1) Hazardous materials table;

(2) Shipping paper requirements;

(3) Marking;

(4) Labeling;

(5) Placarding requirements;

(6) Hazardous materials packaging;

(7) Hazardous materials definitions and preparation;

(8) Other regulated material (e.g., ORM–D);

(9) Reporting hazardous materials accidents; and

(10) Tunnels and railroad crossings.

(b) Hazardous materials handling including:

(1) Forbidden materials and packages;

(2) Loading and unloading materials;

(3) Cargo segregation;

(4) Passenger carrying buses and hazardous materials;

(5) Attendance of motor vehicles;

(6) Parking;

(7) Routes;

(8) Cargo tanks; and

(9) "Safe havens."

(c) Operation of emergency equipment including:

(1) Use of equipment to protect the public;

(2) Special precautions for equipment to be used in fires;

(3) Special precautions for use of emergency equipment when loading or unloading a hazardous materials laden motor vehicle; and

(4) Use of emergency equipment for tank vehicles.

(d) Emergency response procedures including:

(1) Special care and precautions for different types of accidents;

(2) Special precautions for driving near a fire and carrying hazardous materials, and smoking and carrying hazardous materials;

(3) Emergency procedures; and

(4) Existence of special requirements for transporting Class 1.1 and 1.2 explosives.

(e) Operating practices and procedures not otherwise specified.

■ 22. Revise § 383.123 to read as follows:

§ 383.123 Requirements for a school bus endorsement.

(a) An applicant for the school bus endorsement must satisfy the following three requirements:

(1) *Qualify for passenger vehicle endorsement.* Pass the knowledge and skills test for obtaining a passenger vehicle endorsement.

(2) *Knowledge test.* Must have knowledge covering the following topics:

(i) Loading and unloading children, including the safe operation of stop signal devices, external mirror systems, flashing lights, and other warning and passenger safety devices required for school buses by State or Federal law or regulation.

(ii) Emergency exits and procedures for safely evacuating passengers in an emergency.

(iii) State and Federal laws and regulations related to safely traversing railroad-highway grade crossings; and

(iv) Operating practices and procedures not otherwise specified.

(3) *Skills test.* Must take a driving skills test in a school bus of the same vehicle group (see § 383.91(a)) as the school bus applicant will drive.

(b) *Exception.* Knowledge and skills tests administered before September 30, 2002 and approved by FMCSA as meeting the requirements of this section, meet the requirements of paragraphs (a)(2) and (3) of this section.

Appendix to Subpart G of Part 383 [Removed]

■ 23. Remove the appendix to subpart G.

■ 24. Revise § 383.131 to read as follows:

§ 383.131 Test manuals.

(a) *Driver information manual.* (1) A State must provide an FMCSA pre-approved driver information manual to a CLP or CDL applicant. The manual must be comparable to the American Association of Motor Vehicle Administrators' (AAMVA's) "2005 CDL Test System (July 2010 Version) Model Commercial Driver Manual", which FMCSA has approved and provides to all State Driver Licensing Agencies. The driver information manual must include:

(i) Information on how to obtain a CDL and endorsements;

(ii) Information on the requirements described in § 383.71, the implied consent to alcohol testing described in § 383.72, the procedures and penalties contained in § 383.51(b) to which a CLP or CDL holder is exposed for refusal to comply with such alcohol testing, State procedures described in § 383.73, and other appropriate driver information contained in subpart E of this part;

(iii) Information on vehicle groups and endorsements as specified in subpart F of this part;

(iv) The substance of the knowledge and skills that drivers must have, as outlined in subpart G of this part for the different vehicle groups and endorsements; and

(v) Details of testing procedures, including the purpose of the tests, how to respond, and directions for taking the tests.

(2) A State may include any additional State-specific information related to the CDL testing and licensing process.

(b) *Examiner information manual.* (1) A State must provide an FMCSA pre-approved examiner information manual that conforms to model requirements in paragraphs (b)(1)(i–xi) of this section to all knowledge and skills test examiners. To be pre-approved by FMCSA, the examiner information manual must be comparable to AAMVA's "2005 CDL Test System (July 2010 Version) Model CDL Examiner's Manual," which FMCSA has approved and provides to all State Driver Licensing Agencies. The examiner information manual must include:

(i) Information on driver application procedures contained in § 383.71, State procedures described in § 383.73, and other appropriate driver information contained in subpart E of this part;

(ii) Details on information that must be given to the applicant;

(iii) Details on how to conduct the knowledge and skills tests;

(iv) Scoring procedures and minimum passing scores for the knowledge and skills tests;

(v) Information for selecting driving test routes for the skills tests;

(vi) List of the skills to be tested;

(vii) Instructions on where and how the skills will be tested;

(viii) How performance of the skills will be scored;

(ix) Causes for automatic failure of skills tests;

(x) Standardized scoring sheets for the skills tests; and

(xi) Standardized driving instructions for the applicants.

(2) A State may include any additional State-specific information related to the CDL testing process.

■ 25. Revise § 383.133 to read as follows:

§ 383.133 Test methods.

(a) All tests must be constructed in such a way as to determine if the applicant possesses the required knowledge and skills contained in subpart G of this part for the type of motor vehicle or endorsement the applicant wishes to obtain.

(b) Knowledge tests:

(1) States must use the FMCSA pre-approved pool of test questions to develop knowledge tests for each vehicle group and endorsement. The pool of questions must be comparable to those in AAMVA's "2005 CDL Test System (July 2010 Version) 2005 Test Item Summary Forms," which FMCSA has approved and provides to all State Driver Licensing Agencies.

(2) The State method of generating knowledge tests must conform to the requirements in paragraphs (b)(2)(i) through (iv) of this section and be pre-approved by FMCSA. The State method of generating knowledge tests must be comparable to the requirements outlined in AAMVA's "2005 CDL Test System (July 2010 Version) 2005 Requirements Document For Use In Developing Computer-Generated Multiple-Choice CDL Knowledge Tests", which FMCSA has approved and provides to all State Driver Licensing Agencies to develop knowledge tests for each vehicle group and endorsement. These requirements include:

(i) The total difficulty level of the questions used in each version of a test must fall within a set range;

(ii) Twenty-five percent of the questions on a test must be new questions that were not contained in the previous version of the test;

(iii) Identical questions from the previous version of the test must be in a different location on the test and the three possible responses to the questions must be in a different order; and

(iv) Each test must contain a set number of questions with a prescribed number of questions from each of the knowledge areas.

(3) Each knowledge test must be valid and reliable so as to ensure that driver applicants possess the knowledge required under § 383.111. The knowledge tests may be administered in written form, verbally, or in automated format and can be administered in a foreign language, provided no interpreter is used in administering the test.

(4) A State must use a different version of the test when an applicant retakes a previously failed test.

(c) Skills tests:

(1) A State must develop, administer and score the skills tests based solely on

the information and standards contained in the driver and examiner manuals referred to in § 383.131(a) and (b).

(2) A State must use the standardized scores and instructions for administering the tests contained in the examiner manual referred to in § 383.131(b).

(3) An applicant must complete the skills tests in a representative vehicle to ensure that the applicant possess the skills required under § 383.113. In determining whether the vehicle is a representative vehicle for the skills test and the group of CDL for which the applicant is applying, the vehicle's gross vehicle weight rating or gross combination weight rating must be used, not the vehicle's actual gross vehicle weight or gross combination weight.

(4) Skills tests must be conducted in on-street conditions or under a combination of on-street and off-street conditions.

(5) Interpreters are prohibited during the administration of skills tests. Applicants must be able to understand and respond to verbal commands and instructions in English by a skills test examiner. Neither the applicant nor the examiner may communicate in a language other than English during the skills test.

(6) The skills test must be administered and successfully completed in the following order: Pre-trip inspection, basic vehicle control skills, on-road skills. If an applicant fails one segment of the skills test:

(i) The applicant cannot continue to the next segment of the test; and

(ii) Scores for the passed segments of the test are only valid during initial issuance of the CLP. If the CLP is renewed, all three segments of the skills test must be retaken.

(d) Passing scores for the knowledge and skills tests must meet the standards contained in § 383.135.

■ 26. Revise § 383.135 to read as follows:

§ 383.135 Passing knowledge and skills tests.

(a) *Knowledge tests.* (1) To achieve a passing score on each of the knowledge tests, a driver applicant must correctly answer at least 80 percent of the questions.

(2) If a driver applicant who fails the air brake portion of the knowledge test (scores less than 80 percent correct) is issued a CLP or CDL, an air brake restriction must be indicated on the CLP or CDL as required in § 383.95(a).

(3) A driver applicant who fails the combination vehicle portion of the knowledge test (scores less than 80 percent correct) must not be issued a Group A CLP or CDL.

(b) *Skills Tests.* (1) To achieve a passing score on each segment of the skills test, the driver applicant must demonstrate that he/she can successfully perform all of the skills listed in § 383.113 and attain the scores listed in Appendix A of the examiner manual referred to in § 383.131(b) for the type of vehicle being used in the test.

(2) A driver applicant who does not obey traffic laws, causes an accident during the test, or commits any other offense listed as a reason for automatic failure in the standards contained in the driver and examiner manuals referred to in §§ 383.131(a) and (b), must automatically fail the test.

(3) If a driver applicant who performs the skills test in a vehicle not equipped with any type of air brake system is issued a CDL, an air brake restriction must be indicated on the license as required in § 383.95(a).

(4) If a driver applicant who performs the skills test in a vehicle equipped with air over hydraulic brakes is issued a CDL, a full air brake restriction must be indicated on the license as required in § 383.95(b).

(5) If a driver applicant who performs the skills test in a vehicle equipped with an automatic transmission is issued a CDL, a manual transmission restriction must be indicated on the license as required in § 383.95(c).

(6) If a driver applicant who performs the skills test in a combination vehicle requiring a Group A CDL equipped with any non-fifth wheel connection is issued a CDL, a tractor-trailer restriction must be indicated on the license as required in § 383.95(d).

(7) If a driver applicant wants to remove any of the restrictions in paragraphs (b)(3) through (5) of this section, the applicant does not have to retake the complete skills test. The State may administer a modified skills test that demonstrates that the applicant can safely and effectively operate the vehicle's full air brakes, air over hydraulic brakes, and/or manual transmission. In addition, to remove the air brake or full air brake restriction, the applicant must successfully perform the air brake pre-trip inspection and pass the air brake knowledge test.

(8) If a driver applicant wants to remove the tractor-trailer restriction in paragraph (b)(6) of this section, the applicant must retake all three skills tests in a representative tractor-trailer.

(c) *State recordkeeping.* States must record and retain the knowledge and skills test scores of tests taken by driver applicants. The test scores must either be made part of the driver history record or be linked to the driver history record in a separate file.

■ 27. Revise the heading for subpart J to read as follows:

Subpart J—Commercial Learner's Permit and Commercial Driver's License Documents

* * * * *

■ 28. Revise § 383.151 to read as follows:

§ 383.151 General.

(a) The CDL must be a document that is easy to recognize as a CDL.

(b) The CLP must be a separate document from the CDL or non-CDL.

(c) At a minimum, the CDL and the CLP must contain the information specified in § 383.153.

■ 29. Revise § 383.153 to read as follows:

§ 383.153 Information on the CLP and CDL documents and applications.

(a) *Commercial Driver's License.* All CDLs must contain all of the following information:

(1) The prominent statement that the license is a "Commercial Driver's License" or "CDL," except as specified in paragraph (c) of this section.

(2) The full name, signature, and mailing or residential address in the licensing State of the person to whom such license is issued.

(3) Physical and other information to identify and describe such person including date of birth (month, day, and year), sex, and height.

(4) Color photograph, digitized color image, or black and white laser engraved photograph of the driver. The State may issue a temporary CDL without a photo or image, if it is valid for no more than 60 days.

(5) The driver's State license number.

(6) The name of the State which issued the license.

(7) The date of issuance and the date of expiration of the license.

(8) The group or groups of commercial motor vehicle(s) that the driver is authorized to operate, indicated as follows:

(i) A for Combination Vehicle;

(ii) B for Heavy Straight Vehicle; and

(iii) C for Small Vehicle.

(9) The endorsement(s) for which the driver has qualified, if any, indicated as follows:

(i) T for double/triple trailers;

(ii) P for passenger;

(iii) N for tank vehicle;

(iv) H for hazardous materials;

(v) X for a combination of tank vehicle and hazardous materials endorsements;

(vi) S for school bus; and

(vii) At the discretion of the State, additional codes for additional groupings of endorsements, as long as each such discretionary code is fully explained on the front or back of the CDL document.

(10) The restriction(s) placed on the driver from operating certain equipment or vehicles, if any, indicated as follows:

(i) L for No Air brake equipped CMV;

(ii) Z for No Full air brake equipped CMV;

(iii) E for No Manual transmission equipped CMV;

(iv) O for No Tractor-trailer CMV;

(v) M for No Class A passenger vehicle;

(vi) N for No Class A and B passenger vehicle;

(vii) K for Intrastate only;

(viii) V for medical variance; and

(ix) At the discretion of the State, additional codes for additional restrictions, as long as each such restriction code is fully explained on the front or back of the CDL document.

(b) *Commercial Learner's Permit.* (1) A CLP must not contain a photograph, digitized image or other visual representation of the driver.

(2) All CLPs must contain all of the following information:

(i) The prominent statement that the permit is a "Commercial Learner's Permit" or "CLP," except as specified in paragraph (c) of this section, and that it is invalid unless accompanied by the underlying driver's license issued by the same jurisdiction.

(ii) The full name, signature, and mailing or residential address in the permitting State of the person to whom the permit is issued.

(iii) Physical and other information to identify and describe such person including date of birth (month, day, and year), sex, and height.

(iv) The driver's State license number.

(v) The name of the State which issued the permit.

(vi) The date of issuance and the date of expiration of the permit.

(vii) The group or groups of commercial motor vehicle(s) that the driver is authorized to operate, indicated as follows:

(A) A for Combination Vehicle;

(B) B for Heavy Straight Vehicle; and

(C) C for Small Vehicle.

(viii) The endorsement(s) for which the driver has qualified, if any, indicated as follows:

(A) *P for passenger endorsement.* A CLP holder with a P endorsement is prohibited from operating a CMV carrying passengers, other than Federal/State auditors and inspectors, test examiners, other trainees, and the CDL holder accompanying the CLP holder as prescribed by § CFR 383.25(a)(1) of this part;

(B) *S for school bus endorsement.* A CLP holder with an S endorsement is prohibited from operating a school bus with passengers other than Federal/State auditors and inspectors, test examiners, other trainees, and the CDL holder accompanying the CLP holder as prescribed by § 383.25(a)(1) of this part; and

(C) *N for tank vehicle endorsement.* A CLP holder with an N endorsement may only operate an empty tank vehicle and is prohibited from operating any tank vehicle that previously contained hazardous materials that has not been purged of any residue.

(ix) The restriction(s) placed on the driver, if any, indicated as follows:

(A) P for No passengers in CMV bus;

(B) X for No cargo in CMV tank vehicle;

(C) L for No Air brake equipped CMV;

(D) V for medical variance;

(E) M for No Class A passenger vehicle;

(F) N for No Class A and B passenger vehicle;

(G) K for Intrastate only.

(H) Any additional jurisdictional restrictions that apply to the CLP driving privilege.

(c) If the CLP or CDL is a Non-domiciled CLP or CDL, it must contain the prominent statement that the license or permit is a "Non-domiciled Commercial Driver's License," "Non-domiciled CDL," "Non-domiciled Commercial Learner's Permit," or "Non-domiciled CLP," as appropriate. The word "Non-domiciled" must be conspicuously and unmistakably displayed, but may be noncontiguous with the words "Commercial Driver's License," "CDL," "Commercial Learner's Permit," or "CLP."

(d) If the State has issued the applicant an air brake restriction as specified in § 383.95, that restriction must be indicated on the CLP or CDL.

(e) Except in the case of a Non-domiciled CLP or CDL holder who is domiciled in a foreign jurisdiction:

(1) A driver applicant must provide his/her Social Security Number on the application of a CLP or CDL.

(2) The State must provide the Social Security Number to the CDLIS.

(3) The State must not display the Social Security Number on the CLP or CDL.

(f) The State may issue a multipart CDL provided that:

(1) Each document is explicitly tied to the other document(s) and to a single driver's record.

(2) The multipart license document includes all of the data elements specified in this section.

(f) Current CDL holders are not required to be retested to determine whether they need any of the new restrictions for no full air brakes, no manual transmission and no tractor-trailer. These new restrictions only apply to CDL applicants who take skills tests on or after July 8, 2014 (including those applicants who previously held a CDL before the new restrictions went into effect).

(g) On or after July 8, 2014 current CLP and CDL holders who do not have the standardized endorsement and restriction codes and applicants for a CLP or CDL are to be issued CLPs and CDLs with the standardized codes upon initial issuance, renewal, upgrade or transfer.

■ 30. Revise § 383.155 to read as follows:

§ 383.155 Tamperproofing requirements.

States must make the CLP and CDL tamperproof to the maximum extent practicable. At a minimum, a State must use the same tamperproof method used for noncommercial drivers' licenses.

PART 384—STATE COMPLIANCE WITH COMMERCIAL DRIVER'S LICENSE PROGRAM

■ 31. The authority citation for part 384 continues to read as follows:

Authority: 49 U.S.C. 31136, 31301 *et seq.,* and 31502; secs. 103 and 215 of Pub. L. 106–159, 113 Stat. 1753, 1767; and 49 CFR 1.73.

■ 32. Amend § 384.105(b) by revising the definition of *issue and issuance* to read as follows:

§ 384.105 Definitions.

* * * * *

(b) * * *

Issue and *issuance* mean initial issuance, transfer, renewal, or upgrade of a CLP or CDL and Non-domiciled CLP or CDL, as described in § 383.73 of this subchapter.

* * * * *

■ 33. Revise § 384.201 to read as follows:

§ 384.201 Testing program.

(a) The State shall adopt and administer a program for testing and ensuring the fitness of persons to operate commercial motor vehicles (CMVs) in accordance with the minimum Federal standards contained in part 383 of this title.

(b) To obtain a copy of FMCSA pre-approved State Testing System referenced in §§ 383.131, 383.133 and

383.135, State Driver Licensing Agencies may contact: FMCSA, CDL Division, 1200 New Jersey Avenue, SE, Washington DC 20590.

■ 34. Revise § 384.204 to read as follows:

§ 384.204 CLP or CDL issuance and information.

(a) General rule. The State shall authorize a person to operate a CMV only by issuance of a CLP or CDL, unless an exception in § 383.3(c) or (d) applies, which contains, at a minimum, the information specified in part 383, subpart J, of this subchapter.

(b) Exceptions—(1) Training. The State may authorize a person who does not hold a CDL valid for the type of vehicle in which training occurs to undergo behind-the-wheel training in a CMV only by means of a CLP issued and used in accordance with § 383.25 of this subchapter.

(2) *Confiscation of CLP or CDL pending enforcement.* A State may allow a CLP or CDL holder whose CLP or CDL is held in trust by that State or any other State in the course of enforcement of the motor vehicle traffic code, but who has not been convicted of a disqualifying offense under § 383.51 of this subchapter based on such enforcement, to drive a CMV while holding a dated receipt for such CLP or CDL.

■ 35. Revise § 384.205 to read as follows:

§ 384.205 CDLIS information.

Before issuing a CLP or a CDL to any person, the State must, within the period of time specified in § 384.232, perform the check of the Commercial Driver's License Information System (CDLIS) in accordance with § 383.73(b)(3)(ii) of this subchapter, and, based on that information, issue the license or, in the case of adverse information, promptly implement the disqualifications, licensing limitations, denials, and/or penalties that are called for in any applicable section(s) of this subpart.

■ 36. Revise § 384.206 to read as follows:

§ 384.206 State record checks.

(a) *Issuing State's records.* (1) Before issuing, renewing, upgrading, or transferring a CLP or CDL to any person, the driver's State of record must, within the period of time specified in § 384.232, check its own driver records as follows:

(i) The driver record of the person in accordance with § 383.73(b)(3)(i) of this chapter; and

(ii) For a driver who certifies that his/her type of driving is non-excepted, interstate commerce according to § 383.71(b)(1)(ii)(A) of this chapter, the medical certification status information on the person's CDLIS driver record.

(2) Based on the findings of its own State record check, the State of record must do one of the following as appropriate:

(i) Issue, renew, upgrade, or transfer the applicant's CLP or CDL;

(ii) In the event the State obtains adverse information regarding the applicant, promptly implement the disqualifications, licensing limitations, denials, or penalties that are called for in any applicable section(s) of this subpart; or

(iii) In the event there is no information regarding the driver's self-certification for driving type required by § 383.71(b)(1)(ii), or for a driver who is required by § 383.71(h) to be "certified," if the medical certification status of the individual is "non-certified," the State must deny the CDL action requested by the applicant and initiate a downgrade of the CDL, if required by § 383.73(j)(4) of this chapter.

(b) *Other States' records.* (1) Before the initial or transfer issuance of a CLP or CDL to a person, and before renewing or upgrading a CLP or CDL held by any person, the issuing State must:

(i) Require the applicant to provide the names of all States where the applicant has previously been licensed to operate any type of motor vehicle during the previous 10 years.

(ii) Within the time period specified in § 384.232, request the complete driver record from all States where the applicant was licensed within the previous 10 years to operate any type of motor vehicle.

(2) States receiving a request for the driver record of a person currently or previously licensed by the State must provide the information within 30 days.

(3) Based on the findings of the other State record checks, the issuing State must, in the case of adverse information regarding the applicant, promptly implement the disqualifications, licensing limitations, denials, or penalties that are called for in any applicable section(s) of this subpart.

■ 37. Amend § 384.207 by revising the introductory text and paragraph (a) to read as follows:

§ 384.207 Notification of licensing.

Within the period defined in § 383.73(h) of this subchapter, the State must:

(a) Notify the operator of the CDLIS of each CLP or CDL issuance;

* * * * *

■ 38. Amend § 384.208 by revising paragraph (a) to read as follows:

§ 384.208 Notification of disqualification.

(a) No later than 10 days after disqualifying a CLP or CDL holder licensed by another State, or disqualifying an out-of-State CLP or CDL holder's privilege to operate a commercial motor vehicle for at least 60 days, the State must notify the State that issued the license of the disqualification.

* * * * *

■ 39. Amend § 384.209 by revising paragraph (a) to read as follows:

§ 384.209 Notification of traffic violations.

(a) *Required notification with respect to CLP or CDL holders.* Whenever a person who holds a CLP or CDL from another State is convicted of a violation of any State or local law relating to motor vehicle traffic control (other than parking, vehicle weight or vehicle defect violations), in any type of vehicle, the licensing entity of the State in which the conviction occurs must notify the licensing entity in the State where the driver is licensed of this conviction within the time period established in paragraph (c) of this section.

* * * * *

■ 40. Revise § 384.210 to read as follows:

§ 384.210 Limitation on licensing.

A State must not knowingly issue a CLP, a CDL, or a commercial special license or permit (including a provisional or temporary license) permitting a person to drive a CMV during a period in which:

(a) A person is disqualified from operating a CMV, as disqualification is defined in § 383.5 of this subchapter, or under the provisions of § 383.73(j) or § 384.231(b)(2) of this subchapter;

(b) The CLP or CDL holder's noncommercial driving privilege has been disqualified; or

(c) Any type of driver's license held by such person is disqualified by the State where the driver is licensed for any State or local law related to motor vehicle traffic control (other than parking, vehicle weight or vehicle defect violations).

■ 41. Revise § 384.211 to read as follows:

§ 384.211 Surrender of old licenses.

The State may not initially issue, upgrade, or transfer a CDL to a person unless such person first surrenders any previously issued driver's license and CLP.

■ 42. Revise § 384.212 to read as follows:

§ 384.212 Domicile requirement.

(a) The State may issue CDLs or CLPs only to persons for whom the State is the State of domicile as defined in § 383.5 of this subchapter; except that the State may issue a Non-domiciled CLP or CDL under the conditions specified in §§ 383.23(b), 383.71(f), and 383.73(f) of this subchapter.

(b) The State must require any person holding a CLP or CDL issued by another State to apply for a transfer CLP or CDL from the State within 30 days after establishing domicile in the State, as specified in § 383.71(c) of this subchapter.

■ 43. Revise § 384.214 to read as follows:

§ 384.214 Reciprocity.

The State must allow any person to operate a CMV in the State who is not disqualified from operating a CMV and who holds a CLP or CDL that is—

(a) Issued to him or her by his/her State or jurisdiction of domicile in accordance with part 383 of this subchapter;

(b) Not disqualified; and

(c) Valid, under the terms of part 383, subpart F, of this subchapter, for the type of vehicle being driven.

■ 44. Revise § 384.217 to read as follows:

§ 384.217 Drug offenses.

The State must disqualify from operating a CMV for life any person who is convicted, as defined in § 383.5 of this subchapter, in any State or jurisdiction of a first offense of using a CMV (or, in the case of a CLP or CDL holder, a CMV or a non-CMV) in the commission of a felony described in item (9) of Table 1 to § 383.51 of this subchapter. The State shall not apply the special rule in § 384.216(b) to lifetime disqualifications imposed for controlled substance felonies as detailed in item (9) of Table 1 to § 383.51 of this subchapter.

■ 45. Revise § 384.220 to read as follows:

§ 384.220 Problem Driver Pointer System information.

Before issuing a CLP or CDL to any person, the State must, within the period of time specified in § 384.232, perform the check of the Problem Driver Pointer System in accordance with § 383.73(b)(3)(iii) of this subchapter, and, based on that information, promptly implement the disqualifications, licensing limitations, and/or penalties that are called for in any applicable section(s) of this subpart.

■ 46. Amend § 384.225 by revising paragraphs (a) and (b) to read as follows:

§ 384.225 CDLIS driver recordkeeping.

* * * * *

(a) *CLP or CDL holder.* Post and maintain as part of the CDLIS driver record:

(1) All convictions, disqualifications and other licensing actions for violations of any State or local law relating to motor vehicle traffic control (other than parking, vehicle weight, or vehicle defect violations) committed in any type of vehicle.

(2) The following medical certification status information:

(i) Driver self-certification for the type of driving operations provided in accordance with § 383.71(b)(1)(ii) of this chapter, and

(ii) Information from medical certification recordkeeping in accordance with § 383.73(o) of this chapter.

(b) *A person required to have a CLP or CDL.* Record and maintain as part of the CDLIS driver record all convictions, disqualifications and other licensing actions for violations of any State or local law relating to motor vehicle traffic control (other than parking, vehicle weight, or vehicle defect violations) committed while the driver was operating a CMV.

* * * * *

■ 47. Revise § 384.226 to read as follows:

§ 384.226 Prohibition on masking convictions.

The State must not mask, defer imposition of judgment, or allow an individual to enter into a diversion program that would prevent a CLP or CDL holder's conviction for any violation, in any type of motor vehicle, of a State or local traffic control law (other than parking, vehicle weight, or vehicle defect violations) from appearing on the CDLIS driver record, whether the driver was convicted for an offense committed in the State where the driver is licensed or another State.

■ 48. Add § 384.227 to read as follows:

§ 384.227 Record of digital image or photograph.

The State must:

(a) Record the digital color image or photograph or black and white laser engraved photograph that is captured as part of the application process and placed on the licensing document of every person who is issued a CDL, as required under § 383.153. The digital color image or photograph or black and white laser engraved photograph must either be made part of the driver history or be linked to the driver history in a separate file.

(b) Check the digital color image or photograph or black and white laser engraved photograph on record whenever the CDL applicant or holder appears in person to renew, upgrade, or transfer a CDL and when a duplicate CDL is issued.

(c) Check the digital color image or photograph or black and white laser engraved photograph on record whenever the CLP applicant or holder appears in person to renew, upgrade, or transfer a CLP and when a duplicate CLP is issued. If no digital color image or photograph or black and white laser engraved photograph exists on record, the State must check the photograph or image on the base-license presented with the CLP application.

■ 49. Add § 384.228 to read as follows:

§ 384.228 Examiner training and record checks.

For all State and third party CDL test examiners, the State must meet the following 10 requirements:

(a) Establish examiner training standards for initial and refresher training that provides CDL test examiners with a fundamental understanding of the objectives of the CDL testing program, and with all of the knowledge and skills necessary to serve as a CDL test examiner and assist jurisdictions in meeting the Federal CDL testing requirements.

(b) Require all State knowledge and skills test examiners to successfully complete a formal CDL test examiner training course and examination before certifying them to administer CDL knowledge and skills tests.

(c) The training course for CDL knowledge test examiners must cover at least the following three units of instruction:

(1) Introduction to CDL Licensing System:

(i) The Commercial Motor Vehicle Safety Act of 1986.

(ii) Drivers covered by CDL program.

(iii) CDL vehicle classification.

(iv) CDL endorsements and restrictions.

(2) Overview of the CDL tests:

(i) CDL test, classifications, and endorsements.

(ii) Different examinations.

(iii) Representative vehicles.

(iv) Validity and reliability.

(v) Test maintenance.

(3) Knowledge tests:

(i) General knowledge tests.

(ii) Specialized knowledge tests.

(iii) Selecting the appropriate tests and test forms.

(iv) Knowledge test administration.

(d) The training course for CDL skills test examiners must cover at least the following five units of instruction:

(1) Introduction to CDL Licensing System:
(i) The Commercial Motor Vehicle Safety Act of 1986.
(ii) Drivers covered by CDL program.
(iii) CDL vehicle classification.
(iv) CDL endorsements and restrictions.
(2) Overview of the CDL tests:
(i) CDL test, classifications, and endorsements.
(ii) Different examinations.
(iii) Representative vehicles.
(iv) Validity and reliability.
(v) Test maintenance.
(3) Vehicle inspection test:
(i) Test overview.
(ii) Description of safety rules.
(iii) Test scoring procedures.
(iv) Scoring standards.
(v) Calculating final score.
(4) Basic control skills testing:
(i) Setting up the basic control skills course.
(ii) Description of safety rules.
(iii) General scoring procedures.
(iv) Administering the test.
(v) Calculating the score.
(5) Road test:
(i) Setting up the road test.
(ii) Required maneuvers.
(iii) Administering the road test.
(iv) Calculating the score.

(e) Require all third party skills test examiners to successfully complete a formal CDL test examiner training course and examination before certifying them to administer CDL skills tests. The training course must cover at least the five units of instruction in paragraph (d) of this section.

(f) Require State and third party CDL test examiners to successfully complete a refresher training course and examination every four years to maintain their CDL test examiner certification. The refresher training course must cover at least the following:

(1) For CDL knowledge test examiners, the three units of training described in paragraph (c) of this section.

(2) For CDL skills test examiners, the five units of training described in paragraph (d) of this section.

(3) Any State specific material and information related to administering CDL knowledge and skills tests.

(4) Any new Federal CDL regulations, updates to administering the tests, and new safety related equipment on the vehicles.

(g) Complete nationwide criminal background check of all skills test examiners prior to certifying them to administer CDL skills tests.

(h) Complete annual nationwide criminal background check of all test examiners.

(i) Maintain a record of the results of the criminal background check and CDL examiner test training and certification of all CDL test examiners.

(j) Rescind the certification to administer CDL tests of all test examiners who:

(1) Do not successfully complete the required refresher training every four years; or

(2) Do not pass annual nationwide criminal background checks. Criteria for not passing the criminal background check must include at least the following:

(i) Any felony conviction within the last 10 years; or

(ii) Any conviction involving fraudulent activities.

(k) The six units of training described in paragraphs (c) and (d) of this section may be supplemented with State-specific material and information related to administering CDL knowledge and skills tests.

■ 50. Add § 384.229 to read as follows:

§ 384.229 Skills test examiner auditing and monitoring.

To ensure the integrity of the CDL skills testing program, the State must:

(a) At least once every 2 years, conduct unannounced, on-site inspections of third party testers' and examiners' records, including comparison of the CDL skills test results of applicants who are issued CDLs with the CDL scoring sheets that are maintained in the third party testers' files. For third party testers and examiners who were granted the training and skills testing exception under section 383.75(a)(7), the record checks must be performed at least once every year;

(b) At least once every two years, conduct covert and overt monitoring of examinations performed by State and third party CDL skills test examiners. For third party testers and examiners who were granted the training and skills testing exception under § 383.75(a)(7), the covert and overt monitoring must be performed at least once every year;

(c) Establish and maintain a database to track pass/fail rates of applicants tested by each State and third party CDL skills test examiner, in order to focus covert and overt monitoring on examiners who have unusually high pass or failure rates;

(d) Establish and maintain a database of all third party testers and examiners, which at a minimum tracks the dates and results of audits and monitoring actions by the State, the dates third party testers were certified by the State, and name and identification number of each third party CDL skills test examiner;

(e) Establish and maintain a database of all State CDL skills examiners, which at a minimum tracks the dates and results of monitoring action by the State, and the name and identification number of each State CDL skills examiner; and

(f) Establish and maintain a database that tracks skills tests administered by each State and third party CDL skills test examiner's name and identification number.

■ 51. Amend § 384.231 by revising paragraph (b) to read as follows:

§ 384.231 Satisfaction of State disqualification requirement.

* * * * *

(b) *Required action*—(1) *CLP or CDL holders.* A State must satisfy the requirement of this subpart that the State disqualify a person who holds a CLP or a CDL by, at a minimum, disqualifying the person's CLP or CDL for the applicable period of disqualification.

(2) *A person required to have a CLP or CDL.* A State must satisfy the requirement of this subpart that the State disqualify a person required to have a CLP or CDL who is convicted of an offense or offenses necessitating disqualification under § 383.51 of this subchapter. At a minimum, the State must implement the limitation on licensing provisions of § 384.210 and the timing and recordkeeping requirements of paragraphs (c) and (d) of this section so as to prevent such a person from legally obtaining a CLP or CDL from any State during the applicable disqualification period(s) specified in this subpart.

* * * * *

■ 52. Amend § 384.301 by revising paragraph (e) to read as follows:

§ 384.301 Substantial compliance—general requirements.

* * * * *

(e) A State must come into substantial compliance with the requirements of subpart B of this part in effect as of July 8, 2011 as soon as practical but, unless otherwise specifically provided in this part, not later than July 8, 2014.

■ 53. Revise § 384.405 to read as follows:

§ 384.405 Decertification of State CDL program.

(a) *Prohibition on CLP or CDL transactions.* The Administrator may prohibit a State found to be in substantial noncompliance from performing any of the following CLP or CDL transactions:

(1) Initial issuance.

(2) Renewal.
(3) Transfer.
(4) Upgrade.

(b) *Conditions considered in making decertification determination.* The Administrator will consider, but is not limited to, the following five conditions in determining whether the CDL program of a State in substantial noncompliance should be decertified:

(1) The State computer system does not check the Commercial Driver's License Information System (CDLIS) and/or National Driver Registry Problem Driver Pointer System (PDPS) as required by § 383.73 of this subchapter when issuing, renewing, transferring, or upgrading a CLP or CDL.

(2) The State does not disqualify drivers convicted of disqualifying offenses in commercial motor vehicles.

(3) The State does not transmit convictions for out-of-State drivers to the State where the driver is licensed.

(4) The State does not properly administer knowledge and/or skills tests to CLP or CDL applicants or drivers.

(5) The State fails to submit a corrective action plan for a substantial compliance deficiency or fails to implement a corrective action plan within the agreed time frame.

(c) *Standard for considering deficiencies.* The deficiencies described in paragraph (b) of this section must affect a substantial number of either CLP and CDL applicants or drivers.

(d) *Decertification: Preliminary determination.* If the Administrator finds that a State is in substantial noncompliance with subpart B of this part, as indicated by the factors specified in paragraph (b) of this section, among other things, the FMCSA will inform the State that it has made a preliminary determination of noncompliance and that the State's CDL program may therefore be decertified. Any response from the State, including factual or legal arguments or a plan to correct the noncompliance, must be submitted within 30 calendar days after receipt of the preliminary determination.

(e) *Decertification: Final determination.* If, after considering all material submitted by the State in response to the FMCSA preliminary determination, the Administrator decides that substantial noncompliance exists, which warrants decertification of the CDL program, he/she will issue a decertification order prohibiting the State from issuing CLPs and CDLs until such time as the Administrator determines that the condition(s) causing the decertification has (have) been corrected.

(f) *Recertification of a State.* The Governor of the decertified State or his/her designated representative must submit a certification and documentation that the condition causing the decertification has been corrected. If the FMCSA determines that the condition causing the decertification has been satisfactorily corrected, the Administrator will issue a recertification order, including any conditions that must be met in order to begin issuing CLPs and CDLs in the State.

(g) *State's right to judicial review.* Any State aggrieved by an adverse decision under this section may seek judicial review under 5 U.S.C. Chapter 7.

(h) *Validity of previously issued CLPs or CDLs.* A CLP or CDL issued by a State prior to the date the State is prohibited from issuing CLPs or CDLs in accordance with provisions of paragraph (a) of this section, will remain valid until its stated expiration date.

PART 385—SAFETY FITNESS PROCEDURES

■ 54. The authority citation for part 385 continues to read as follows:

Authority: 49 U.S.C. 113, 504, 521(b), 5105(e), 5109, 5113, 13901–13905, 31136, 31144, 31148, and 31502; Sec. 350 of Pub. L. 107–87; and 49 CFR 1.73.

■ 55. Amend appendix B, section VII, List of Acute and Critical Regulations, by redesignating the entries for §§ 383.37(a) and 383.37(b) as §§ 383.37(b) and 383.37(c) and adding a new entry for § 383.37(a) to read as follows:

Appendix B to Part 385—Explanation of Safety Rating Process

* * * * *

VII. List of Acute and Critical Regulations.

* * * * *

§ 383.37(a) Knowingly allowing, requiring, permitting, or authorizing an employee who does not have a current CLP or CDL, who does not have a CLP or CDL with the proper class or endorsements, or who operates a CMV in violation of any restriction on the CLP or CDL to operate a CMV (acute).

* * * * *

Issued on: March 28, 2011.

Anne S. Ferro,

Administrator.

[FR Doc. 2011–10510 Filed 5–5–11; 8:45 am]

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Part IV

Environmental Protection Agency

Agency Information Collection Activities: Request for Comments on Sixty-Four Proposed Information Collection Requests (ICRs); Notice

ENVIRONMENTAL PROTECTION AGENCY

[Docket ID Numbers EPA–HQ–OECA–2011–0203–0210, 0216–0220, 0222–0226, 0228–0236, 0238–0246, 0248–0275; FRL–9302–6]

Agency Information Collection Activities: Request for Comments on Sixty-Four Proposed Information Collection Requests (ICRs)

AGENCY: Environmental Protection Agency (EPA)

ACTION: Notice

SUMMARY: In compliance with the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*), this document announces that EPA is planning to submit the following sixty-four existing, approved, continuing Information Collection Requests (ICR) to the Office of Management and Budget (OMB) for the purpose of renewing the ICRs. Before submitting the ICRs to OMB for review and approval, EPA is soliciting comments on specific aspects of the information collections as described under **SUPPLEMENTARY INFORMATION**.

DATES: Comments must be submitted on or before July 8, 2011.

ADDRESSES: Comments may be submitted electronically, by mail, or through hand delivery/courier service. Follow the detailed instructions as provided under **SUPPLEMENTARY INFORMATION**, section A.

FOR FURTHER INFORMATION CONTACT: The contact individuals for each ICR are listed under **SUPPLEMENTARY INFORMATION**, section II. C.

SUPPLEMENTARY INFORMATION:

A. How can I access the docket and/or submit comments?

(1) Docket Access Instructions

EPA has established a public docket for the ICRs listed in the **SUPPLEMENTARY INFORMATION**, section II. B. The docket is available for online viewing at *http://www.regulations.gov,* or in person viewing at the Enforcement and Compliance Docket and Information Center (ECDIC), in the EPA Docket Center (EPA/DC), EPA West, Room 3334, 1301 Constitution Avenue, NW., Washington, DC. The EPA/DC Public Reading Room is open from 8 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Reading Room is (202)566–1744, and the telephone number for the Enforcement and Compliance Docket and Information Center (ECDIC) docket is (202)566–1752.

Use *http://www.regulations.gov* to obtain a copy of the draft collection of information, submit or view public comments, access the index listing of the contents of the docket, and to access those documents in the public docket that are available electronically. When in the system, select "search," then key in the docket ID number identified in this document.

(2) Instructions for Submitting Comments

Submit your comments by one of the following methods:

(a) *Electronic Submission:* Access *http://www.regulations.gov* and follow the on-line instructions for submitting comments.

(b) *E-mail: docket.oeca@epa.gov.*

(c) *Fax:* (202) 566–1511(d) *Mail:* Enforcement and Compliance Docket and Information Center (ECDIC), Environmental Protection Agency, EPA Docket Center (EPA/DC), Mail code: 2201T, 1200 Pennsylvania Avenue, NW., Washington, DC 20460.

(d) *Hand Delivery:* Enforcement and Compliance Docket and Information Center (ECDIC), Environmental Protection Agency, EPA Docket Center (EPA/DC), EPA West, Room 3334, 1301 Constitution Avenue, NW., Washington, DC. The EPA Docket Center is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. Deliveries are only accepted during the Docket Center's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

Direct your comments to the specific docket listed in **SUPPLEMENTARY INFORMATION**, section II. B, and reference the OMB Control Number for the ICR. It is EPA policy that all comments received will be included in the public docket without change and may be made available online at *http://www.regulations.gov,* including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through www.regulations.gov or e-mail. The *http://www.regulations.gov* Web site is an "anonymous access" system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through www.regulations.gov, your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. For additional information about the EPA public docket, visit the EPA Docket Center homepage at *http://www.epa.gov/epahome/dockets.htm.*

B. What information is EPA particularly interested in?

Pursuant to section 3506(c)(2)(A) of the Paperwork Reduction Act (PRA), EPA is soliciting comments and information to enable it to:

(1) Evaluate whether the proposed collections of information are necessary for the proper performance of the functions of the Agency, including whether the information will have practical utility.

(2) Evaluate the accuracy of the Agency's estimates of the burdens of the proposed collections of information.

(3) Enhance the quality, utility, and clarity of the information to be collected.

(4) Minimize the burden of the collections of information on those who are to respond, including through the use of appropriate automated or electronic collection technologies, or other forms of information technology, e.g., permitting electronic submission of responses.

C. What should I consider when I prepare my comments for EPA?

You may find the following suggestions helpful for preparing comments:

(1) Explain your views as clearly as possible and provide specific examples.

(2) Describe any assumptions that you used.

(3) Provide copies of any technical information and/or data you used that support your views.

(4) If you estimate potential burden or costs, explain how you arrived at the estimate that you provide.

(5) Offer alternative ways to improve the collection activity.

(6) Make sure to submit your comments by the deadline identified under *DATES*.

(7) To ensure proper receipt by EPA, be sure to identify the docket ID number assigned to this action in the subject line on the first page of your response. You may also provide the name, date, and Federal Register citation.

ICRs To Be Renewed

A. For All ICRs

The Agency computed the burden for each of the recordkeeping and reporting requirements applicable to the industry for the currently approved ICRs listed in this notice. Where applicable, the Agency identified specific tasks and made assumptions, while being consistent with the concept of the PRA.

Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions to; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements which have subsequently changed; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

The listed ICRs address Clean Air Act information collection requirements in standards (i.e., regulations) which have mandatory recordkeeping and reporting requirements. Records collected under the New Source Performance Standards (NSPS) must be retained by the owner or operator for at least two years and the records collected under the National Emission Standards for Hazardous Air Pollutants (NESHAP) must be retained by the owner or operator for at least five years. In general, the required collections consist of emissions data and other information deemed not to be private.

In the absence of such information collection requirements, enforcement personnel would be unable to determine whether the standards are being met on a continuous basis as required by the Clean Air Act.

An Agency may not conduct or sponsor, and a person is not required to respond to, a collection of information, unless the Agency displays a currently valid OMB control number. The OMB control numbers for the EPA regulations under Title 40 of the Code of Federal Regulations are published in the Federal Register, or on the related collection instrument or form. The display of OMB control numbers for certain EPA regulations is consolidated at 40 CFR part 9.

B. What information collection activity or ICR does this apply to?

In compliance with the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*), this notice announces that EPA is planning to submit sixty-four proposed, continuing Information Collection Requests (ICR) to the Office of Management and Budget (OMB):

(1) *Docket ID Number:* EPA–HQ–OECA–2011–0203.

Title: NESHAP for Engine Test Cells/Stands (40 CFR Part 63, Subpart PPPPP).

ICR Numbers: EPA ICR Number 2066.05, OMB Control Number 2060–0483.

ICR Status: This ICR is scheduled to expire on November 30, 2011.

(2) *Docket ID Number:* EPA–HQ–OECA–2011–0204.

Title: NESHAP—Reporting and Recordkeeping Requirements for the Friction Materials Manufacturing Facilities (40 CFR Part 63, Subpart QQQQQ).

ICR Numbers: EPA ICR Number 2025.05, OMB Control Number 2060–0481.

ICR Status: This ICR is scheduled to expire on November 30, 2011.

(3) *Docket ID Number:* EPA–HQ–OECA–2011–0205.

Title: NESHAP for Primary Copper Smelters (40 CFR Part 63, Subpart QQQ).

ICR Numbers: EPA ICR Number 1850.06, OMB Control Number 2060–0476.

ICR Status: This ICR is scheduled to expire on November 30, 2011.

(4) *Docket ID Number:* EPA–HQ–OECA–2011–0206.

Title: NESHAP for Leather Finishing Operations (40 CFR Part 63, Subpart TTTT)

ICR Numbers: EPA ICR Number 1985.05, OMB Control Number 2060–0478.

ICR Status: This ICR is scheduled to expire on November 30, 2011.

(5) *Docket ID Number:* EPA–HQ–OECA–2011–0207.

Title: NESHAP for Pesticide Active Ingredient Production (40 CFR Part 63, Subpart MMM).

ICR Numbers: EPA ICR Number 1807.05, OMB Control Number 2060–0370.

ICR Status: This ICR is scheduled to expire on December 31, 2011.

(6) *Docket ID Number:* EPA–HQ–OECA–2011–0208.

Title: NESHAP for Pulp and Paper Production (40 CFR Part 63, Subpart S).

ICR Numbers: EPA ICR Number 1657.07, OMB Control Number 2060–0387.

ICR Status: This ICR is scheduled to expire on December 31, 2011.

(7) *Docket ID Number:* EPA–HQ–OECA–2011–0209.

Title: NESHAP for Chemical Recovery Combustion Sources at Kraft, Soda, Sulfite, and Stand-Alone Semichemical Pulp Mills (40 CFR Part 63, Subpart MM).

ICR Numbers: EPA ICR Number 1805.06, OMB Control Number 2060–0377.

ICR Status: This ICR is scheduled to expire on December 31, 2011.

(8) *Docket ID Number:* EPA–HQ–OECA–2011–0210.

Title: NSPS for Municipal Waste Combustors (40 CFR Part 60, Subparts Ea and Eb).

ICR Numbers: EPA ICR Number 1506.12, OMB Control Number 2060–0210.

ICR Status: This ICR is scheduled to expire on December 31, 2011.

(9) *Docket ID Number:* EPA–HQ–OECA–2011–0216.

Title: NESHAP for Cellulose Products Manufacturing (40 CFR Part 63, Subpart UUUU.

ICR Numbers: EPA ICR Number 1974.06, OMB Control Number 2060–0488.

ICR Status: This ICR is scheduled to expire on December 31, 2011.

(10) *Docket ID Number:* EPA–HQ–OECA–2011–0217.

Title: NSPS for Sulfuric Acid Plants (40 CFR Part 60, Subpart H).

ICR Numbers: EPA ICR Number 1057.12, OMB Control Number 2060–0041.

ICR Status: This ICR is scheduled to expire on December 31, 2011.

(11) *Docket ID Number:* EPA–HQ–OECA–2011–0218.

Title: NSPS for Metallic Mineral Processing Plants (40 CFR Part 60, Subpart LL).

ICR Numbers: EPA ICR Number 0982.10, OMB Control Number 2060–0016.

ICR Status: This ICR is scheduled to expire on December 31, 2011.

(12) *Docket ID Number:* EPA–HQ–OECA–2011–0219.

Title: NSPS for Primary and Secondary Emissions from Basic Oxygen Furnaces (40 CFR Part 60, Subparts N and Na).

ICR Numbers: EPA ICR Number 1069.10, OMB Control Number 2060–0029.

ICR Status: This ICR is scheduled to expire on December 31, 2011.

(13) *Docket ID Number:* EPA–HQ–OECA–2011–0220.

Title: NSPS for Glass Manufacturing Plants (40 CFR Part 60, Subpart CC).

ICR Numbers: EPA ICR Number 1131.10, OMB Control Number 2060–0054.

ICR Status: This ICR is scheduled to expire on December 31, 2011.

(14) *Docket ID Number:* EPA–HQ–OECA–2011–0222.

Title: NSPS for Petroleum Refineries (40 CFR Part 60, Subpart J).

ICR Numbers: EPA ICR Number 1054.11, OMB Control Number 2060–0022.

ICR Status: This ICR is scheduled to expire on December 31, 2011.

(15) *Docket ID Number:* EPA–HQ–OECA–2011–0223.

Title: NSPS for Bulk Gasoline Terminals (40 CFR Part 60, Subpart XX).

ICR Numbers: EPA ICR Number 0664.10, OMB Control Number 2060–0006.

ICR Status: This ICR is scheduled to expire on December 31, 2011.

(16) *Docket ID Number:* EPA–HQ–OECA–2011–0224.

Title: NSPS for Calciners and Dryers in Mineral Industries (40 CFR Part 60, Subpart UUU).

ICR Numbers: EPA ICR Number 0746.08, OMB Control Number 2060–0251.

ICR Status: This ICR is scheduled to expire on December 31, 2011.

(17) *Docket ID Number:* EPA–HQ–OECA–2011–0225.

Title: NSPS for Municipal Solid Waste Landfills (40 CFR Part 60, Subpart WWW).

ICR Numbers: EPA ICR Number 1557.08, OMB Control Number 2060–0220.

ICR Status: This ICR is scheduled to expire on December 31, 2011.

(18) *Docket ID Number:* EPA–HQ–OECA–2011–0226.

Title: NSPS for Metal Coil Surface Coating (40 CFR Part 60, Subpart TT).

ICR Numbers: EPA ICR Number 0660.11, OMB Control Number 2060–0107.

ICR Status: This ICR is scheduled to expire on December 31, 2011.

(19) *Docket ID Number:* EPA–HQ–OECA–2011–0228.

Title: NSPS for Petroleum Refineries (40 CFR Part 60, Subpart Ja).

ICR Numbers: EPA ICR Number 2263.03, OMB Control Number 2060–0602.

ICR Status: This ICR is scheduled to expire on December 31, 2011.

(20) *Docket ID Number:* EPA–HQ–OECA–2011–0229.

Title: NESHAP for Iron and Steel Foundries Area Sources (40 CFR Part 63, Subpart ZZZZZ).

ICR Numbers: EPA ICR Number 2267.03, OMB Control Number 2060–0605.

ICR Status: This ICR is scheduled to expire on December 31, 2011.

(21) *Docket ID Number:* EPA–HQ–OECA–2011–0230.

Title: NESHAP for Source Categories: Gasoline Distribution Bulk Terminals, Bulk Plants, Pipeline Facilities and Gasoline Dispensing Facilities (40 CFR Part 63, Subparts BBBBBB and CCCCCC).

ICR Numbers: EPA ICR Number 2237.03, OMB Control Number 2060–0620.

ICR Status: This ICR is scheduled to expire on December 31, 2011.

(22) *Docket ID Number:* EPA–HQ–OECA–2011–0231.

Title: NESHAP for Ferroalloys Production: Ferromanganese and Silicomanganese (40 CFR Part 63, Subpart XXX).

ICR Numbers: EPA ICR Number 1831.05, OMB Control Number 2060–0391.

ICR Status: This ICR is scheduled to expire on January 31, 2012.

(23) *Docket ID Number:* EPA–HQ–OECA–2011–0232.

Title: NESHAP for Metal Coil Surface Coating Plants (40 CFR Part 63, Subpart SSSS).

ICR Numbers: EPA ICR Number 1957.06, OMB Control Number 2060–0487.

ICR Status: This ICR is scheduled to expire on January 31, 2012.

(24) *Docket ID Number:* EPA–HQ–OECA–2011–0233.

Title: NESHAP for Plating and Polishing Area Sources (40 CFR Part 63, Subpart WWWWWW).

ICR Numbers: EPA ICR Number 2294.03, OMB Control Number 2060–0622.

ICR Status: This ICR is scheduled to expire on January 31, 2012.

(25) *Docket ID Number:* EPA–HQ–OECA–2011–0234.

Title: NESHAP for Petroleum Refineries (40 CFR Part 63, Subpart CC).

ICR Numbers: EPA ICR Number 1692.07, OMB Control Number 2060–0340.

ICR Status: This ICR is scheduled to expire on February 29, 2012.

(26) *Docket ID Number:* EPA–HQ–OECA–2011–0235.

Title: NESHAP for Source Categories: Generic Maximum Achievable Control Technology Standards for Carbon Black, Ethylene, Cyanide and Spandex (40 CFR Part 63, Subpart YY).

ICR Numbers: EPA ICR Number 1983.06, OMB Control Number 2060–0489.

ICR Status: This ICR is scheduled to expire on March 31, 2012.

(27) *Docket ID Number:* EPA–HQ–OECA–2011–0236.

Title: NESHAP for Ferroalloys Production Area Sources (40 CFR Part 63, Subpart YYYYYY).

ICR Numbers: EPA ICR Number 2303.03, OMB Control Number 2060–0625.

ICR Status: This ICR is scheduled to expire on March 31, 2012.

(28) *Docket ID Number:* EPA–HQ–OECA–2011–0238.

Title: NESHAP for Natural Gas Transmission and Storage Facilities (40 CFR Part 63, Subpart HHH).

ICR Numbers: EPA ICR Number 1789.07, OMB Control Number 2060–0418.

ICR Status: This ICR is scheduled to expire on April 30, 2012.

(29) *Docket ID Number:* EPA–HQ–OECA–2011–0239.

Title: NSPS for Grain Elevators (40 CFR Part 60, Subpart DD).

ICR Numbers: EPA ICR Number 1130.10, OMB Control Number 2060–0082.

ICR Status: This ICR is scheduled to expire on April 30, 2012.

(30) *Docket ID Number:* EPA–HQ–OECA–2011–0240.

Title: NSPS for Lime Manufacturing (40 CFR Part 60, Subpart HH).

ICR Numbers: EPA ICR Number 1167.10, OMB Control Number 2060–0063.

ICR Status: This ICR is scheduled to expire on April 30, 2012.

(31) *Docket ID Number:* EPA–HQ–OECA–2011–0241.

Title: NSPS for Hot Mix Asphalt Facilities (40 CFR Part 60, Subpart I).

ICR Numbers: EPA ICR Number 1127.10, OMB Control Number 2060–0083.

ICR Status: This ICR is scheduled to expire on April 30, 2012.

(32) *Docket ID Number:* EPA–HQ–OECA–2011–0242.

Title: NSPS for Kraft Pulp Mills (40 CFR Part 60, Subpart BB).

ICR Numbers: EPA ICR Number 1055.10, OMB Control Number 2060–0021.

ICR Status: This ICR is scheduled to expire on April 30, 2012.

(33) *Docket ID Number:* EPA–HQ–OECA–2011–0243.

Title: NESHAP for Coke Oven Batteries (40 CFR Part 63, Subpart L).

ICR Numbers: EPA ICR Number 1362.09, OMB Control Number 2060–0253.

ICR Status: This ICR is scheduled to expire on May 31, 2012.

(34) *Docket ID Number:* EPA–HQ–OECA–2011–0244.

Title: NESHAP for Polyether Polyols Production (40 CFR Part 63, Subpart PPP).

ICR Numbers: EPA ICR Number 1811.07, OMB Control Number 2060–0415.

ICR Status: This ICR is scheduled to expire on May 31, 2012.

(35) *Docket ID Number:* EPA–HQ–OECA–2011–0245.

Title: NESHAP for Inorganic Arsenic Emissions from Glass Manufacturing Plants (40 CFR Part 61, Subpart N).

ICR Numbers: EPA ICR Number 1081.10, OMB Control Number 2060–0043.

ICR Status: This ICR is scheduled to expire on May 31, 2012.

(36) *Docket ID Number:* EPA–HQ–OECA–2011–0246.

Title: NESHAP for Primary Lead Smelters (40 CFR Part 63, Subpart TTT).

ICR Numbers: EPA ICR Number 1856.08, OMB Control Number 2060–0414.

ICR Status: This ICR is scheduled to expire on May 31, 2012.

(37) *Docket ID Number:* EPA–HQ–OECA–2011–0248.

Title: NESHAP for Steel Pickling, HCL Process Facilities and Hydrochloric Acid Regeneration Plants (40 CFR Part 63, Subpart CCC).

ICR Numbers: EPA ICR Number 1821.07, OMB Control Number 2060–0419.

ICR Status: This ICR is scheduled to expire on May 31, 2012.

(38) *Docket ID Number:* EPA–HQ–OECA–2011–0249.

Title: NSPS for Other Solid Waste Incineration Units (40 CFR Part 60, Subpart EEEE).

ICR Numbers: EPA ICR Number 2163.04, OMB Control Number 2060–0563.

ICR Status: This ICR is scheduled to expire on May 31, 2012.

(39) *Docket ID Number:* EPA–HQ–OECA–2011–0250.

Title: NESHAP for Wet-Formed Fiberglass Mat Production (40 CFR Part 63, Subpart HHHH).

ICR Numbers: EPA ICR Number 1964.05, OMB Control Number 2060–0496.

ICR Status: This ICR is scheduled to expire on June 30, 2012.

(40) *Docket ID Number:* EPA–HQ–OECA–2011–0251.

Title: NESHAP for Source Categories: Generic Maximum Achievable Control Technology Standards for Acetal Resin; Acrylic and Modacrylic Fiber; Hydrogen Fluoride and Polycarbonate Production (40 CFR Part 63, Subpart YY).

ICR Numbers: EPA ICR Number 1871.06, OMB Control Number 2060–0420.

ICR Status: This ICR is scheduled to expire on June 30, 2012.

(41) *Docket ID Number*: EPA–HQ–OECA–2011–0252.

Title: NESHAP for Asbestos (40 CFR Part 61, Subpart M).

ICR Numbers: EPA ICR Number 0111.13, OMB Control Number 2060–0101.

ICR Status: This ICR is scheduled to expire on June 30, 2012.

(42) *Docket ID Number:* EPA–HQ–OECA–2011–0253.

Title: NSPS for Nonmetallic Mineral Processing (40 CFR Part 60, Subpart OOO).

ICR Numbers: EPA ICR Number 1084.12, OMB Control Number 2060–0050.

ICR Status: This ICR is scheduled to expire on June 30, 2012.

(43) *Docket ID Number:* EPA–HQ–OECA–2011–0254.

Title: NESHAP for Miscellaneous Metal Parts and Products (40 CFR Part 63, Subpart MMMM).

ICR Numbers: EPA ICR Number 2056.04, OMB Control Number 2060–0486.

ICR Status: This ICR is scheduled to expire on July 31, 2012.

(44) *Docket ID Number:* EPA–HQ–OECA–2011–0255.

Title: NESHAP for Flexible Polyurethane Foam Fabrication (40 CFR Part 63, Subpart MMMMM).

ICR Numbers: EPA ICR Number 2027.05, OMB Control Number 2060–0516.

ICR Status: This ICR is scheduled to expire on July 31, 2012.

(45) *Docket ID Number:* EPA–HQ–OECA–2011–0256.

Title: Emission Guidelines for Existing Other Solid Waste Incineration Units (40 CFR Part 60, Subpart FFFF).

ICR Numbers: EPA ICR Number 2164.04, OMB Control Number 2060–0562.

ICR Status: This ICR is scheduled to expire on July 31, 2012.

(46) *Docket ID Number:* EPA–HQ–OECA–2011–0257.

Title: NESHAP for Reinforced Plastic Composites Production (40 CFR Part 63, Subpart WWWW).

ICR Numbers: EPA ICR Number 1976.05, OMB Control Number 2060–0509.

ICR Status: This ICR is scheduled to expire on July 31, 2012.

(47) *Docket ID Number:* EPA–HQ–OECA–2011–0258.

Title: NESHAP for Paper and Other Web Coating (40 CFR Part 63, Subpart JJJJ).

ICR Numbers: EPA ICR Number 1951.05, OMB Control Number 2060–0511.

ICR Status: This ICR is scheduled to expire on July 31, 2012.

(48) *Docket ID Number:* EPA–HQ–OECA–2011–0259.

Title: NESHAP for the Surface Coating of Large Household and Commercial Appliances (40 CFR Part 63, Subpart NNNN).

ICR Numbers: EPA ICR Number 1954.05, OMB Control Number 2060–0457.

ICR Status: This ICR is scheduled to expire on July 31, 2012.

(49) *Docket ID Number:* EPA–HQ–OECA–2011–0260.

Title: NESHAP for Brick and Structural Clay Manufacturing (40 CFR Part 63, Subpart JJJJJ).

ICR Numbers: EPA ICR Number 2022.05, OMB Control Number 2060–0508.

ICR Status: This ICR is scheduled to expire on July 31, 2012.

(50) *Docket ID Number:* EPA–HQ–OECA–2011–0261.

Title: NESHAP for Refractory Products Manufacturing (40 CFR Part 63, Subpart SSSSS).

ICR Numbers: EPA ICR Number 2040.05, OMB Control Number 2060–0515.

ICR Status: This ICR is scheduled to expire on July 31, 2012.

(51) *Docket ID Number:* EPA–HQ–OECA–2011–0262.

Title: NESHAP for Semiconductor Manufacturing (40 CFR Part 63, Subpart BBBBB).

ICR Numbers: EPA ICR Number 2042.05, OMB Control Number 2060–0519.

ICR Status: This ICR is scheduled to expire on July 31, 2012.

(52) *Docket ID Number:* EPA–HQ–OECA–2011–0263.

Title: NESHAP for Printing, Coating and Dyeing of Fabrics and Other Textiles (40 CFR Part 63, Subpart OOOO).

ICR Numbers: EPA ICR Number 2071.05, OMB Control Number 2060–0522.

ICR Status: This ICR is scheduled to expire on August 31, 2012.

(53) *Docket ID Number:* EPA–HQ–OECA–2011–0264.

Title: NSPS for Stationary Source Compression Ignition Internal Combustion Engines (40 CFR Part 60, Subpart IIII).

ICR Numbers: EPA ICR Number 2196.04, OMB Control Number 2060–0590.

ICR Status: This ICR is scheduled to expire on August 31, 2012.

(54) *Docket ID Number:* EPA–HQ–OECA–2011–0265.

Title: NESHAP for Municipal Solid Waste Landfalls (40 CFR Part 63, Subpart AAAA).

ICR Numbers: EPA ICR Number 1938.05, OMB Control Number 2060–0505.

ICR Status: This ICR is scheduled to expire on August 31, 2012.

(55) *Docket ID Number:* EPA–HQ–OECA–2011–0266.

Title: NESHAP for Publicly Owned Treatment Works (40 CFR Part 63, Subpart VVV).

ICR Numbers: EPA ICR Number 1891.06, OMB Control Number 2060–0428.

ICR Status: This ICR is scheduled to expire on August 31, 2012.

(56) *Docket ID Number:* EPA–HQ–OECA–2011–0267.

Title: NESHAP for Asphalt Processing and Asphalt Roofing Manufacturing (40 CFR Part 63, Subpart LLLLL).

ICR Numbers: EPA ICR Number 2029.05, OMB Control Number 2060–0520.

ICR Status: This ICR is scheduled to expire on August 31, 2012.

(57) *Docket ID Number:* EPA–HQ–OECA–2011–0268.

Title: NESHAP for Benzene Waste Operations (40 CFR Part 61, Subpart FF).

ICR Numbers: EPA ICR Number 1541.10, OMB Control Number 2060–0183.

ICR Status: This ICR is scheduled to expire on August 31, 2012.

(58) *Docket ID Number:* EPA–HQ–OECA–2011–0269.

Title: NESHAP for Coke Oven: Pushing, Quenching, and Battery Stacks (40 CFR Part 63, Subpart CCCCC).

ICR Numbers: EPA ICR Number 1995.05, OMB Control Number 2060–0521.

ICR Status: This ICR is scheduled to expire on August 31, 2012.

(59) *Docket ID Number:* EPA–HQ–OECA–2011–0270.

Title: NSPS for Petroleum Dry Cleaners (40 CFR Part 60, Subpart JJJ).

ICR Numbers: EPA ICR Number 0997.10, OMB Control Number 2060–0079.

ICR Status: This ICR is scheduled to expire on August 31, 2012.

(60) *Docket ID Number:* EPA–HQ–OECA–2011–0271.

Title: NESHAP for Integrated Iron and Steel Manufacturing (40 CFR Part 63, Subpart FFFFF).

ICR Numbers: EPA ICR Number 2003.05, OMB Control Number 2060–0517.

ICR Status: This ICR is scheduled to expire on August 31, 2012.

(61) *Docket ID Number:* EPA–HQ–OECA–2011–0272.

Title: State and Federal Emission Guidelines for Hospital/Medical/Infectious Waste Incinerators (40 CFR Part 60, Subpart Ce, and 40 CFR Part 62, Subpart HHH).

ICR Numbers: EPA ICR Number 1899.07, OMB Control Number 2060–0422.

ICR Status: This ICR is scheduled to expire on September 30, 2012.

(62) *Docket ID Number:* EPA–HQ–OECA–2011–0273.

Title: NESHAP for Shipbuilding and Ship Repair Facilities—Surface Coating (40 CFR Part 63, Subpart II).

ICR Numbers: EPA ICR Number 1712.07, OMB Control Number 2060–0330.

ICR Status: This ICR is scheduled to expire on September 30, 2012.

(63) *Docket ID Number:* EPA–HQ–OECA–2011–0274.

Title: NESHAP for the Wood Building Products Surface Coating Industry (40 CFR Part 63, Subpart QQQQ).

ICR Numbers: EPA ICR Number 2034.05, OMB Control Number 2060–0510.

ICR Status: This ICR is scheduled to expire on September 30, 2012.

(64) *Docket ID Number:* EPA–HQ–OECA–2011–0275.

Title: NESHAP for Hydrochloric Acid Production (40 CFR Part 63, Subpart NNNNN).

ICR Numbers: EPA ICR Number 2032.07, OMB Control Number 2060–0529.

ICR Status: This ICR is scheduled to expire on September 30, 2012.

C. Contact Individuals for ICRs

(1) NESHAP for Engine Test Cells/Stands (40 CFR Part 63, Subpart PPPPP); Learia Williams of the Office of Compliance (202) 564–4113 or via e-mail to *williams.learia@epa.gov;* EPA ICR Number 2066.05, OMB Control Number 2060–0483; expiration date November 30, 2011.

(2) NESHAP—Reporting and Recordkeeping Requirements for the Friction Materials Manufacturing Facilities (40 CFR Part 63, Subpart QQQQQ); Learia Williams of the Office of Compliance (202) 564–4113 or via e-mail to *williams.learia@epa.gov;* EPA ICR Number 2025.05, OMB Control Number 2060–0481; expiration date November 30, 2011.

(3) NESHAP for Primary Copper Smelters (40 CFR Part 63, Subpart QQQ); Learia Williams of the Office of Compliance (202) 564–4113 or via e-mail to *williams.learia@epa.gov;* EPA ICR Number 1850.06, OMB Control Number 2060–0476; expiration date November 30, 2011.

(4) NESHAP for Leather Finishing Operations (40 CFR Part 63, Subpart TTTT); Learia Williams of the Office of Compliance (202) 564–4113 or via e-mail to *williams.learia@epa.gov;* EPA ICR Number 1985.05, OMB Control Number 2060–0478; expiration date November 30, 2011.

(5) NESHAP for Pesticide Active Ingredient Production (40 CFR Part 63, Subpart MMM); Learia Williams of the Office of Compliance (202) 564–4113 or via e-mail to *williams.learia@epa.gov;* EPA ICR Number 1807.05, OMB Control Number 2060–0370; expiration date December 31, 2011.

(6) NESHAP for Pulp and Paper Production (40 CFR Part 63, Subpart S); Learia Williams of the Office of Compliance (202) 564–4113 or via e-mail to *williams.learia@epa.gov;* EPA ICR Number 1657.07, OMB Control Number 2060–0387; expiration date December 31, 2011.

(7) NESHAP for Chemical Recovery Combustion Sources at Kraft, Soda, Sulfite, and Stand-Alone Semichemical Pulp Mills (40 CFR, Part 63, Subpart MM); Learia Williams of the Office of Compliance (202) 564–4113 or via e-mail to *williams.learia@epa.gov;* EPA ICR Number 1805.06, OMB Control Number 2060–0377; expiration date December 31, 2011.

(8) NSPS for Municipal Waste Combustors (40 CFR Part 60, Subparts Ea and Eb); Learia Williams of the Office of Compliance (202) 564–4113 or via e-mail to *williams.learia@epa.gov;* EPA ICR Number 1506.12, OMB Control Number 2060–0210; expiration date December 31, 2011.

(9) NESHAP for Cellulose Products Manufacturing (40 CFR Part 63, Subpart UUUU); Learia Williams of the Office of Compliance (202) 564–4113 or via e-mail to *williams.learia@epa.gov;* EPA ICR Number 1974.06, OMB Control Number 2060–0488; expiration date December 31, 2011.

(10) NSPS for Sulfuric Acid Plants (40 CFR Part 60, Subpart H); Learia Williams of the Office of Compliance (202) 564–4113 or via e-mail to *williams.learia@epa.gov;* EPA ICR Number 1057.12, OMB Control Number 2060–0041; expiration date December 31, 2011.

(11) NSPS for Metallic Mineral Processing Plants (40 CFR Part 60, Subpart LL); Learia Williams of the Office of Compliance (202) 564–4113 or via e-mail to *williams.learia@epa.gov;* EPA ICR Number 0982.10, OMB Control Number 2060–0016; expiration date December 31, 2011.

(12) NSPS for Primary and Secondary Emissions from Basic Oxygen Furnaces (40 CFR Part 60, Subparts N and Na); Learia Williams of the Office of Compliance (202) 564–4113 or via e-mail to *williams.learia@epa.gov;* EPA ICR Number 1069.10, OMB Control Number 2060–0029; expiration date December 31, 2011.

(13) NSPS for Glass Manufacturing Plants (40 CFR Part 60, Subpart CC); Learia Williams of the Office of Compliance (202) 564–4113 or via e-mail to *williams.learia@epa.gov;* EPA ICR Number 1131.10, OMB Control Number 2060–0054; expiration date December 31, 2011.

(14) NSPS for Petroleum Refineries (40 CFR Part 60, Subpart J); Learia Williams of the Office of Compliance (202) 564–4113 or via e-mail to *williams.learia@epa.gov;* EPA ICR Number 1054.11, OMB Control Number 2060–0022; expiration date December 31, 2011.

(15) NSPS for Bulk Gasoline Terminals (40 CFR Part 60, Subpart XX); Learia Williams of the Office of Compliance (202) 564–4113 or via e-mail to *williams.learia@epa.gov;* EPA ICR Number 0664.10, OMB Control Number 2060–0006; expiration date December 31, 2011.

(16) NSPS for Calciners and Dryers in Mineral Industries (40 CFR Part 60, Subpart UUU); Learia Williams of the Office of Compliance (202) 564–4113 or via e-mail to *williams.learia@epa.gov;* EPA ICR Number 0746.08, OMB Control Number 2060–0251; expiration date December 31, 2011.

(17) NSPS for Municipal Solid Waste Landfills (40 CFR Part 60, Subpart WWW); Learia Williams of the Office of Compliance (202) 564–4113 or via e-mail to *williams.learia@epa.gov;* EPA ICR Number 1557.08, OMB Control Number 2060–0220; expiration date December 31, 2011.

(18) NSPS for Metal Coil Surface Coating (40 CFR Part 60, Subpart TT); Learia Williams of the Office of Compliance (202) 564–4113 or via e-mail to *williams.learia@epa.gov;* EPA ICR Number 0660.11, OMB Control Number 2060–0107; expiration date December 31, 2011.

(19) NSPS for Petroleum Refineries (40 CFR Part 60, Subpart Ja); Learia Williams of the Office of Compliance (202) 564–4113 or via e-mail to *williams.learia@epa.gov;* EPA ICR Number 2263.03, OMB Control Number 2060–0602; expiration date December 31, 2011.

(20) NESHAP for Iron and Steel Foundries Area Sources (40 CFR Part 63, Subpart ZZZZZ); Learia Williams of the Office of Compliance (202) 564–4113 or via e-mail to *williams.learia@epa.gov;* EPA ICR Number 2267.03, OMB Control Number 2060–0605; expiration date December 31, 2011.

(21) NESHAP for Source Categories: Gasoline Distribution Bulk Terminals, Bulk Plants, Pipeline Facilities and Gasoline Dispensing Facilities (40 CFR Part 63, Subparts BBBBBB and CCCCCC); Learia Williams of the Office of Compliance (202) 564–4113 or via e-mail to *williams.learia@epa.gov;* EPA ICR Number 2237.03, OMB Control Number 2060–0620; expiration date December 31, 2011.

(22) NESHAP for Ferroalloys Production: Ferromanganese and Silicomanganese (40 CFR Part 63, Subpart XXX); Learia Williams of the Office of Compliance (202) 564–4113 or via e-mail to *williams.learia@epa.gov;* EPA ICR Number 1831.05, OMB Control Number 2060–0391; expiration date January 31, 2012.

(23) NESHAP for Metal Coil Surface Coating Plants (40 CFR Part 63, Subpart SSSS); Learia Williams of the Office of Compliance (202) 564–4113 or via e-mail to *williams.learia@epa.gov;* EPA ICR Number 1957.06, OMB Control Number 2060–0487; expiration date January 31, 2012.

(24) NESHAP for Plating and Polishing Area Sources (40 CFR Part 63, Subpart WWWWWW); Learia Williams of the Office of Compliance (202) 564–4113 or via e-mail to *williams.learia@epa.gov;* EPA ICR Number 2294.03, OMB Control Number 2060–0622; expiration date January 31, 2012.

(25) NESHAP for Petroleum Refineries (40 CFR Part 63, Subpart CC); Learia Williams of the Office of Compliance (202) 564–4113 or via e-mail to *williams.learia@epa.gov;* EPA ICR Number 1692.07, OMB Control Number 2060–0340; expiration date February 29, 2012.

(26) NESHAP for Source Categories: Generic Maximum Achievable Control Technology Standards for Carbon Black, Ethylene, Cyanide and Spandex (40 CFR Part 63, Subpart YY); Learia Williams of the Office of Compliance (202) 564–4113 or via e-mail to *williams.learia@epa.gov;* EPA ICR Number 1983.06, OMB Control Number 2060–0489; expiration date March 31, 2012.

(27) NESHAP for Ferroalloys Production Area Sources (40 CFR Part 63, Subpart YYYYYY); Learia Williams of the Office of Compliance (202) 564–4113 or via e-mail to *williams.learia@epa.gov;* EPA ICR Number 2303.03, OMB Control Number 2060–0625; expiration date March 31, 2012.

(28) NESHAP for Natural Gas Transmission and Storage Facilities (40 CFR Part 63, Subpart HHH); Learia Williams of the Office of Compliance (202) 564–4113 or via e-mail to *williams.learia@epa.gov;* EPA ICR Number 1789.07, OMB Control Number 2060–0418; expiration date April 30, 2012.

(29) NSPS for Grain Elevators (40 CFR Part 60, Subpart DD); Learia Williams of the Office of Compliance (202) 564–4113 or via e-mail to *williams.learia@epa.gov;* EPA ICR Number 1130.10, OMB Control Number 2060–0082; expiration date April 30, 2012.

(30) NSPS for Lime Manufacturing (40 CFR Part 60, Subpart HH); Learia Williams of the Office of Compliance (202) 564–4113 or via e-mail to *williams.learia@epa.gov;* EPA ICR Number 1167.10, OMB Control Number 2060–0063; expiration date April 30, 2012.

(31) NSPS for Hot Mix Asphalt Facilities (40 CFR Part 60, Subpart I); Learia Williams of the Office of Compliance (202) 564–4113 or via e-mail to *williams.learia@epa.gov;* EPA ICR Number 1127.10, OMB Control Number 2060–0083; expiration date April 30, 2012.

(32) NSPS for Kraft Pulp Mills (40 CFR Part 60, Subpart BB); Learia Williams of the Office of Compliance (202) 564–4113 or via e-mail to *williams.learia@epa.gov;* EPA ICR Number 1055.10, OMB Control Number 2060–0021; expiration date April 30, 2012.

(33) NESHAP for Coke Oven Batteries (40 CFR Part 63, Subpart L); Learia Williams of the Office of Compliance (202) 564–4113 or via e-mail to *williams.learia@epa.gov;* EPA ICR Number 1362.09, OMB Control Number 2060–0253; expiration date May 31, 2012.

(34) NESHAP for Polyether Polyols Production (40 CFR Part 63, Subpart PPP); Learia Williams of the Office of Compliance (202) 564–4113 or via e-mail to *williams.learia@epa.gov;* EPA ICR Number 1811.07, OMB Control Number 2060–0415; expiration date May 31, 2012.

(35) NESHAP for Inorganic Arsenic Emissions from Glass Manufacturing Plants (40 CFR Part 61, Subpart N); Learia Williams of the Office of Compliance (202) 564–4113 or via e-mail to *williams.learia@epa.gov;* EPA ICR Number 1081.10, OMB Control Number 2060–0043; expiration date May 31, 2012.

(36) NESHAP for Primary Lead Smelters (40 CFR Part 63, Subpart TTT); Learia Williams of the Office of Compliance (202) 564–4113 or via e-mail to *williams.learia@epa.gov;* EPA ICR Number 1856.08, OMB Control Number 2060–0414; expiration date May 31, 2012.

(37) NESHAP for Steel Pickling, HCL Process Facilities and Hydrochloric Acid Regeneration Plants (40 CFR Part 63, Subpart CCC); Learia Williams of the Office of Compliance (202) 564–4113 or via e-mail to *williams.learia@epa.gov;* EPA ICR Number 1821.07, OMB Control Number 2060–0419; expiration date May 31, 2012.

(38) NSPS for Other Solid Waste Incineration Units (40 CFR Part 60, Subpart EEEE); Learia Williams of the Office of Compliance (202) 564–4113 or via e-mail to *williams.learia@epa.gov;* EPA ICR Number 2163.04, OMB Control Number 2060–0563; expiration date May 31, 2012.

(39) NESHAP for Wet-Formed Fiberglass Mat Production (40 CFR Part 63, Subpart HHHH); Learia Williams of the Office of Compliance (202) 564–4113 or via e-mail to *williams.learia@epa.gov;* EPA ICR Number 1964.05, OMB Control Number 2060–0496; expiration date June 30, 2012.

(40) NESHAP for Source Categories: Generic Maximum Achievable Control Technology Standards for Acetal Resin; Acrylic and Modacrylic Fiber; Hydrogen Fluoride and Polycarbonate Production (40 CFR Part 63, Subpart YY); Learia Williams of the Office of Compliance (202) 564–4113 or via e-mail to *williams.learia@epa.gov;* EPA ICR Number 1871.06, OMB Control Number 2060–0420; expiration date June 30, 2012.

(41) NESHAP for Asbestos (40 CFR Part 61, Subpart M); Learia Williams of the Office of Compliance (202) 564–4113 or via e-mail to *williams.learia@epa.gov;* EPA ICR Number 0111.13, OMB Control Number 2060–0101; expiration date June 30, 2012.

(42) NSPS for Nonmetallic Mineral Processing (40 CFR Part 60, Subpart OOO); Learia Williams of the Office of Compliance (202) 564–4113 or via e-mail to *williams.learia@epa.gov;* EPA ICR Number 1084.11, OMB Control Number 2060–0050; expiration date June 30, 2012.

(43) NESHAP for Miscellaneous Metal Parts and Products (40 CFR Part 63, Subpart MMMM); Learia Williams of the Office of Compliance (202) 564–4113 or via e-mail to *williams.learia@epa.gov;* EPA ICR Number 2056.04, OMB Control Number 2060–0486; expiration date July 31, 2012.

(44) NESHAP for Flexible Polyurethane Foam Fabrication (40 CFR Part 63, Subpart MMMMM); Learia Williams of the Office of Compliance (202) 564–4113 or via e-mail to *williams.learia@epa.gov;* EPA ICR Number 2027.05, OMB Control Number 2060–0516; expiration date July 31, 2012.

(45) Emission Guidelines for Existing Other Solid waste Incineration Units (40 CFR Part 60, Subpart FFFF); Learia Williams of the Office of Compliance (202) 564–4113 or via e-mail to *williams.learia@epa.gov;* EPA ICR Number 2164.04, OMB Control Number 2060–0562; expiration date July 31, 2012.

(46) NESHAP for Reinforced Plastic Composites Production (40 CFR Part 63, Subpart WWWW); Learia Williams of the Office of Compliance (202) 564–4113 or via e-mail to *williams.learia@epa.gov;* EPA ICR Number 1976.05, OMB Control Number 2060–0509; expiration date July 31, 2012.

(47) NESHAP for Paper and Other Web Coating (40 CFR Part 63, Subpart JJJJ); Learia Williams of the Office of Compliance (202) 564–4113 or via e-mail to *williams.learia@epa.gov;* EPA ICR Number 1951.05, OMB Control Number 2060–0511; expiration date July 31, 2012.

(48) NESHAP for the Surface Coating of Large Household and Commercial Appliances (40 CFR Part 63, Subpart NNNN); Learia Williams of the Office of Compliance (202) 564–4113 or via e-mail to *williams.learia@epa.gov;* EPA ICR Number 1954.05, OMB Control Number 2060–0457; expiration date July 31, 2012.

(49) NESHAP for Brick and Structural Clay Manufacturing (40 CFR Part 63, Subpart JJJJJ); Learia Williams of the Office of Compliance (202) 564–4113 or via e-mail to *williams.learia@epa.gov;* EPA ICR Number 2022.05, OMB Control Number 2060–0508; expiration date July 31, 2012.

(50) NESHAP for Refractory Products Manufacturing (40 CFR Part 63, Subpart SSSSS); Learia Williams of the Office of Compliance (202) 564–4113 or via e-mail to *williams.learia@epa.gov;* EPA ICR Number 2040.05, OMB Control Number 2060–0515; expiration date July 31, 2012.

(51) NESHAP for Semiconductor Manufacturing (40 CFR Part 63, Subpart BBBBB); Learia Williams of the Office of Compliance (202) 564–4113 or via e-mail to *williams.learia@epa.gov;* EPA ICR Number 2042.05, OMB Control Number 2060–0519; expiration date July 31, 2012.

(52) NESHAP for Printing, Coating and Dyeing of Fabrics and Other Textiles (40 CFR Part 63, Subpart OOOO); Learia Williams of the Office of Compliance (202) 564–4113 or via e-mail to *williams.learia@epa.gov;* EPA ICR Number 2071.05, OMB Control Number 2060–0522; expiration date August 31, 2012.

(53) NSPS for Stationary Source Compression Ignition Internal Combustion Engines (40 CFR Part 60, Subpart IIII); Learia Williams of the Office of Compliance (202) 564–4113 or via e-mail to *williams.learia@epa.gov;* EPA ICR Number 2196.04, OMB Control Number 2060–0590; expiration date August 31, 2012.

(54) NESHAP for Municipal Solid Waste Landfalls (40 CFR Part 63, Subpart AAAA); Learia Williams of the Office of Compliance (202) 564–4113 or via e-mail to *williams.learia@epa.gov;* EPA ICR Number 1938.05, OMB Control Number 2060–0505; expiration date August 31, 2012.

(55) NESHAP for Publicly Owned Treatment Works (40 CFR Part 63, Subpart VVV); Learia Williams of the Office of Compliance (202) 564–4113 or via e-mail to *williams.learia@epa.gov;* EPA ICR Number 1891.06, OMB Control Number 2060–0428; expiration date August 31, 2012.

(56) NESHAP for Asphalt Processing and Asphalt Roofing Manufacturing (40 CFR Part 63, Subpart LLLLL); Learia Williams of the Office of Compliance (202) 564–4113 or via e-mail to *williams.learia@epa.gov;* EPA ICR Number 2029.05, OMB Control Number 2060–0520; expiration date August 31, 2012.

(57) NESHAP for Benzene Waste Operations (40 CFR Part 61, Subpart FF); Learia Williams of the Office of Compliance (202) 564–4113 or via e-mail to *williams.learia@epa.gov;* EPA ICR Number 1541.10, OMB Control Number 2060–0183; expiration date August 31, 2012.

(58) NESHAP for Coke Oven: Pushing, Quenching, and Battery Stacks (40 CFR Part 63, Subpart CCCCC); Learia Williams of the Office of Compliance (202) 564–4113 or via e-mail to *williams.learia@epa.gov;* EPA ICR Number 1995.05, OMB Control Number 2060–0521; expiration date August 31, 2012.

(59) NSPS for Petroleum Dry Cleaners (40 CFR Part 60, Subpart JJJ); Learia Williams of the Office of Compliance (202) 564–4113 or via e-mail to *williams.learia@epa.gov;* EPA ICR Number 0997.10, OMB Control Number

2060–0079; expiration date August 31, 2012.

(60) NESHAP for Integrated Iron and Steel Manufacturing (40 CFR Part 63, Subpart FFFFF); Learia Williams of the Office of Compliance (202) 564–4113 or via e-mail to *williams.learia@epa.gov;* EPA ICR Number 2003.05, OMB Control Number 2060–0517; expiration date August 31, 2012.

(61) State and Federal Emission Guidelines for Hospital/Medical/Infectious Waste Incinerators (40 CFR Part 60, Subpart Ce and 40 CFR part 62, Subpart HHH); Learia Williams of the Office of Compliance (202) 564–4113 or via e-mail to *williams.learia@epa.gov;* EPA ICR Number 1899.07, OMB Control Number 2060–0422; expiration date September 30, 2012.

(62) NESHAP for Shipbuilding and Ship Repair Facilities—Surface Coating (40 CFR Part 63, Subpart II); Learia Williams of the Office of Compliance (202) 564–4113 or via e-mail to *williams.learia@epa.gov;* EPA ICR Number 1712.07, OMB Control Number 2060–0330; expiration date September 30, 2012.

(63) NESHAP for the Wood Building Products Surface Coating Industry (40 CFR Part 63, Subpart QQQQ); Learia Williams of the Office of Compliance (202) 564–4113 or via e-mail to *williams.learia@epa.gov;* EPA ICR Number 2034.05, OMB Control Number 2060–0510; expiration date September 30, 2012.

(64) NESHAP for Hydrochloric Acid Production (40 CFR Part 63, Subpart NNNNN); Learia Williams of the Office of Compliance (202) 564–4113 or via e-mail to *williams.learia@epa.gov;* EPA ICR Number 2032.07, OMB Control Number 2060–0529; expiration date September 30, 2012.

D. Information for Individual ICRs

(1) NESHAP for Engine Test Cells/Stands (40 CFR Part 63, Subpart PPPPP), Docket ID Number: EPA–HQ–OECA–2011–0203, EPA ICR Number 2066.05, OMB Control Number 2060–0483, expiration date November 30, 2011.

Affected Entities: Entities potentially affected by this action are the owners or operators of engine test cells/stands facilities.

Abstract: The affected entities are subject to the General Provisions of the NESHAP at 40 CFR part 63, subpart A, and any changes, or additions to the General Provisions specified at 40 CFR part 63, subpart PPPPP.

Owners or operators of the affected facilities must submit initial notification, performance tests, and periodic reports and results. Owners or operators are also required to maintain records of the occurrence and duration of any startup, shutdown, or malfunction in the operation of an affected facility, or any period during which the monitoring system is inoperative. Reports, at a minimum, are required semiannually.

Burden Statement: The annual public reporting and recordkeeping burden for this collection of information is estimated to average 76 hours per response.

Respondents/Affected Entities: Owners or operators of engine test cells/stands.

Estimated Number of Respondents: 18.

Frequency of Response: Initially, semiannually, and annually.

Estimated Total Annual Hour Burden: 3,043.

Estimated Total Annual Cost: $247,864, which includes $242,864 in labor costs, no capital/startup costs, and $5,000 in operating and maintenance costs.

(2) NESHAP for Reporting and Recordkeeping Requirements for the Friction Materials Manufacturing Facilities (40 CFR Part 63, Subpart QQQQ), Docket ID Number: EPA–HQ–OECA–2011–0204, EPA ICR Number 2025.05, OMB Control Number 2060–0481, expiration date November 30, 2011.

Affected Entities: Entities potentially affected by this action are the owners or operators of friction materials manufacturing facilities.

Abstract: The affected entities are subject to the General Provisions of the NESHAP at 40 CFR part 63, subpart A, and any changes, or additions to the General Provisions specified at 40 CFR part 63, subpart QQQQ.

Owners or operators of the affected facilities must submit initial notification, performance tests, and periodic reports and results. Owners or operators are also required to maintain records of the occurrence and duration of any startup, shutdown, or malfunction in the operation of an affected facility, or any period during which the monitoring system is inoperative. Reports, at a minimum, are required semiannually.

Burden Statement: The annual public reporting and recordkeeping burden for this collection of information is estimated to average 162 hours per response.

Respondents/Affected Entities: Owners or operators of friction materials manufacturing facilities.

Estimated Number of Respondents: 4.

Frequency of Response: Initially, on occasion, semiannually, and annually.

Estimated Total Annual Hour Burden: 1,296.

Estimated Total Annual Cost: $104,512, which includes $103,424 in labor costs, no capital/startup costs, and $1,088 in operating and maintenance costs.

(3) NESHAP for Primary Copper Smelters (40 CFR Part 63, Subpart QQQQ), Docket ID Number: EPA–HQ–OECA–2011–0205, EPA ICR Number 1850.06, OMB Control Number 2060–0476, expiration date November 30, 2011.

Affected Entities: Entities potentially affected by this action are the owners or operators of primary copper smelters.

Abstract: The affected entities are subject to the General Provisions of the NESHAP at 40 CFR part 63, subpart A, and any changes, or additions to the General Provisions specified at 40 CFR part 63, subpart QQQQ.

Owners or operators of the affected facilities must submit initial notification, performance tests, and periodic reports and results. Owners or operators are also required to maintain records of the occurrence and duration of any startup, shutdown, or malfunction in the operation of an affected facility, or any period during which the monitoring system is inoperative. Reports, at a minimum, are required semiannually.

Burden Statement: The annual public reporting and recordkeeping burden for this collection of information is estimated to average 196 hours per response.

Respondents/Affected Entities: Owners or operators of stationary gas turbines.

Estimated Number of Respondents: 3.

Frequency of Response: On occasion, initially, monthly, semiannually, and annually.

Estimated Total Annual Hour Burden: 8,837.

Estimated Total Annual Cost: $575,068, which includes $566,848 in labor costs, no capital/startup costs, and $8,220 in operating and maintenance costs.

(4) NESHAP for Leather Finishing Operations (40 CFR Part 63, Subpart TTTT), Docket ID Number: EPA–HQ–OECA–2011–0206, EPA ICR Number 1985.05, OMB Control Number 2060–0478, expiration date November 30, 2011.

Affected Entities: Entities potentially affected by this action are the owners or operators of leather finishing operations.

Abstract: The affected entities are subject to the General Provisions of the NESHAP at 40 CFR part 63, subpart A, and any changes, or additions to the

General Provisions specified at 40 CFR part 63, subpart TTTT.

Owners or operators of the affected facilities must submit initial notification, performance tests, and periodic reports and results. Owners or operators are also required to maintain records of the occurrence and duration of any startup, shutdown, or malfunction in the operation of an affected facility, or any period during which the monitoring system is inoperative. Burden Statement: The annual public reporting and recordkeeping burden for this collection of information is estimated to average 33 hours per response.

Respondents/Affected Entities: Owners or operators of leather finishing operations.

Estimated Number of Respondents: 10.

Frequency of Response: Initially, on occasion, and annually.

Estimated Total Annual Hour Burden: 334.

Estimated Total Annual Cost: $21,279, which includes $21,279 in labor costs, no capital/startup costs, and no operating and maintenance costs.

(5) NESHAP for Pesticide Active Ingredient Production (40 CFR Part 63, Subpart MMM), Docket ID Number: EPA–HQ–OECA–2011–0207, EPA ICR Number 1807.05, OMB Control Number 2060–0370, expiration date December 31, 2011.

Affected Entities: Entities potentially affected by this action are the owners or operators of pesticide active ingredient facilities.

Abstract: The affected entities are subject to the General Provisions of the NESHAP at 40 CFR part 63, subpart A, and any changes, or additions to the General Provisions specified at 40 CFR part 63, subpart MMM.

Owners or operators of the affected facilities must submit initial notification, performance tests, and periodic reports and results. Owners or operators are also required to maintain records of the occurrence and duration of any startup, shutdown, or malfunction in the operation of an affected facility, or any period during which the monitoring system is inoperative. Reports, at a minimum, are required semiannually.

Burden Statement: The annual public reporting and recordkeeping burden for this collection of information is estimated to average 60 hours per response.

Respondents/Affected Entities: Pesticide active ingredient production facilities.

Estimated Number of Respondents: 88.

Frequency of Response: Initially, quarterly, and semiannually.

Estimated Total Annual Hour Burden: 24,168.

Estimated Total Annual Cost: $1,895,079, which includes $1,542,049 in labor costs, $236,430 in capital/startup costs, and $116,600 in operating and maintenance costs.

(6) NESHAP for Pulp and Paper Production (40 CFR Part 63, Subpart S), Docket ID Number: EPA–HQ–OECA–2011–0208, EPA ICR Number 1657.07, OMB Control Number 2060–0387, expiration date December 31, 2011.

Affected Entities: Entities potentially affected by this action are the owners or operators of pulp and paper production.

Abstract: The affected entities are subject to the General Provisions of the NESHAP at 40 CFR part 63, subpart A, and any changes, or additions to the General Provisions specified at 40 CFR part 63, subpart S.

Owners or operators of the affected facilities must submit initial notification, performance tests, and periodic reports and results. Owners or operators are also required to maintain records of the occurrence and duration of any startup, shutdown, or malfunction in the operation of an affected facility, or any period during which the monitoring system is inoperative. Reports, at a minimum, are required semiannually.

Burden Statement: The annual public reporting and recordkeeping burden for this collection of information is estimated to average 104 hours per response.

Respondents/Affected Entities: Owners or operators of pulp paper mills.

Estimated Number of Respondents: 137.

Frequency of Response: Initially, quarterly, and semiannually.

Estimated Total Annual Hour Burden: 42,444.

Estimated Total Annual Cost: $3,085,125, which includes $2,708,125 in labor costs, no capital/startup costs, and $377,000 in operating and maintenance costs.

(7) NESHAP for Chemical Recovery Combustion Sources at Kraft, Soda, Sulfite, and Stand-Alone Semichemical Pulp Mills (40 CFR Part 63, Subpart MM), Docket ID Number: EPA–HQ–OECA–2011–0209, EPA ICR Number 1805.06, OMB Control Number 2060–0377, expiration date December 31, 2011.

Affected Entities: Entities potentially affected by this action are the owners or operators of chemical recovery combustion sources at kraft, soda, sulfite, and stand-alone semichemical pulp mills.

Abstract: The affected entities are subject to the General Provisions of the NESHAP at 40 CFR part 63, subpart A, and any changes, or additions to the General Provisions specified at 40 CFR part 63, subpart MM.

Owners or operators of the affected facilities must submit initial notifications; notifications of performance tests; notifications of performance evaluations; notification of compliance status, including the results of performance tests. Owners or operators are also required to maintain records of the occurrence and duration of any startup, shutdown, or malfunction in the operation of an affected facility, or any period during which the monitoring system is inoperative. Reports, at a minimum, are required semiannually.

Burden Statement: The annual public reporting and recordkeeping burden for this collection of information is estimated to average 104 hours per response.

Respondents/Affected Entities: Owners or operators of aerospace manufacturing and rework facilities sulfur units at petroleum refineries.

Estimated Number of Respondents: 136.

Frequency of Response: Initially, semiannually and on-occasion.

Estimated Total Annual Hour Burden: 42,444.

Estimated Total Annual Cost: $3,085,125, which includes $2,708,125 in labor costs, no capital/startup costs, and $377,000 in operating and maintenance costs.

(8) NSPS for Municipal Waste Combustors (40 CFR Part 60, Subparts Ea and Eb), Docket ID Number: EPA–HQ–OECA–2011–0210, EPA ICR Number 1506.12, OMB Control Number 2060–0210, expiration December 31, 2011.

Affected Entities: Entities potentially affected by this action are the owners or operators of municipal waste combustors.

Abstract: The affected entities are subject to the General Provisions of the NSPS at 40 CFR part 60, subpart A, and any changes, or additions to the General Provisions specified at 40 CFR part 60, subparts Ea and Eb.

Owners or operators of the affected facilities must submit initial notification, performance tests, and periodic reports. Owners or operators are also required to maintain records of the occurrence and duration of any startup, shutdown, or malfunction in the operation of an affected facility, or

any period during which the monitoring system is inoperative.

Burden Statement: The annual public reporting and recordkeeping burden for this collection of information is estimated to average 198 hours per response.

Respondents/Affected Entities: Municipal waste combustors.

Estimated Number of Respondents: 12.

Frequency of Response: Initially, quarterly, semiannually, and annually.

Estimated Total Annual Hour Burden: 20,421.

Estimated Total Annual Cost: $1,635,293, which includes $1,476,293 in labor costs, $60,000 in capital/startup costs, and $99,000 in operating and maintenance costs.

(9) NESHAP for Cellulose Products Manufacturing (40 CFR Part 63, Subpart UUUU), Docket ID Number: EPA–HQ–OECA–2011–0216, EPA ICR Number 1974.06, OMB Control Number 2060–0488, expiration December 31, 2011.

Affected Entities: Entities potentially affected by this action are the owners or operators of cellulose products manufacturing operation.

Abstract: The affected entities are subject to the General Provisions of the NESHAP at 40 CFR part 63, subpart A, and any changes, or additions to the General Provisions specified at 40 CFR part 63, subpart UUUU.

Owners or operators of the affected facilities must submit initial notification, performance tests, and periodic reports and results. Owners or operators are also required to maintain records of the occurrence and duration of any startup, shutdown, or malfunction in the operation of an affected facility, or any period during which the monitoring system is inoperative. Reports, at a minimum, are required semiannually.

Burden Statement: The annual public reporting and recordkeeping burden for this collection of information is estimated to average 141 hours per response.

Respondents/Affected Entities: Cellulose products manufacturing.

Estimated Number of Respondents: 13.

Frequency of Response: On-occasion, weekly, and semiannually.

Estimated Total Annual Hour Burden: 12,088.

Estimated Total Annual Cost: $965,095, which includes $964,081 in labor costs, no capital/startup costs, and $1,014 in operating and maintenance costs.

(10) NSPS for Sulfuric Acid Plants (40 CFR Part 60, Subpart H), Docket ID Number: EPA–HQ–OECA–2011–0217, EPA ICR Number 1057.12, OMB Control Number 2060–0041, expiration December 31, 2011.

Affected Entities: Entities potentially affected by this action are the owners or operators of sulfuric acid plants.

Abstract: The affected entities are subject to the General Provisions of the NSPS at 40 CFR part 60, subpart A, and any changes, or additions to the General Provisions specified at 40 CFR part 60, subpart H.

Owners or operators of the affected facilities must submit initial notification, performance tests, and periodic reports and results. Owners or operators are also required to maintain records of the occurrence and duration of any startup, shutdown, or malfunction in the operation of an affected facility, or any period during which the monitoring system is inoperative. Reports, at a minimum, are required semiannually.

Burden Statement: The annual public reporting and recordkeeping burden for this collection of information is estimated to average 127 hours per response.

Respondents/Affected Entities: Sulfuric acid plants.

Estimated Number of Respondents: 103.

Frequency of Response: Initially, occasionally, and semiannually.

Estimated Total Annual Hour Burden: 26,177.

Estimated Total Annual Cost: $2,576,771, which includes $2,113,271 in labor costs, no capital/startup costs, and $463,500 in operating and maintenance costs.

(11) NSPS for Metallic Mineral Processing Plants (40 CFR Part 60, Subpart LL), Docket ID Number: EPA–HQ–OECA–2011–0218, EPA ICR Number 0982.10, OMB Control Number 2060–0016, expiration December 31, 2011.

Affected Entities: Entities potentially affected by this action are the owners or operators of metallic mineral processing plants.

Abstract: The affected entities are subject to the General Provisions of the NSPS at 40 CFR part 60, subpart A, and any changes, or additions to the General Provisions specified at 40 CFR part 60, subpart LL.

Owners or operators of the affected facilities must submit initial notification, performance tests, and periodic reports and results. Owners or operators are also required to maintain records of the occurrence and duration of any startup, shutdown, or malfunction in the operation of an affected facility, or any period during which the monitoring system is inoperative. Reports, at a minimum, are required semiannually.

Burden Statement: The annual public reporting and recordkeeping burden for this collection of information is estimated to average 52 hours per response.

Respondents/Affected Entities: Metallic mineral processing plants.

Estimated Number of Respondents: 20.

Frequency of Response: Initially, semiannually and on-occasion.

Estimated Total Annual Hour Burden: 2,306.

Estimated Total Annual Cost: $199,140, which includes $186,140 in labor costs, no capital/startup costs, and $13,000 in operating and maintenance costs.

(12) NSPS for Primary and Secondary Emissions from Basic Oxygen Furnaces (40 CFR Part 60, Subparts N and Na), Docket ID Number: EPA–HQ–OECA–2011–0219, EPA ICR Number 1069.10, OMB Control Number 2060–0029, expiration December 31, 2011.

Affected Entities: Entities potentially affected by this action are the owners or operators of basic oxygen furnaces.

Abstract: The affected entities are subject to the General Provisions of the NSPS at 40 CFR part 60, subpart A, and any changes, or additions to the General Provisions specified at 40 CFR part 60, subparts N and Na.

Owners or operators of the affected facilities must submit initial notification, performance tests, and periodic reports and results. Owners or operators are also required to maintain records of the occurrence and duration of any startup, shutdown, or malfunction in the operation of an affected facility, or any period during which the monitoring system is inoperative. Reports, at a minimum, are required semiannually.

Burden Statement: The annual public reporting and recordkeeping burden for this collection of information is estimated to average 158 hours per response.

Respondents/Affected Entities: Facilities with basic oxygen furnaces.

Estimated Number of Respondents: 5.

Frequency of Response: Initially, occasionally, and semiannually.

Estimated Total Annual Hour Burden: 1,896.

Estimated Total Annual Cost: $179,440, which includes $153,043 in labor costs, $18,000 in capital/startup costs, and $8,397 in operating and maintenance costs.

(13) NSPS for Glass Manufacturing Plants (40 CFR Part 60, Subpart CC), Docket ID Number: EPA–HQ–OECA–2011–0220, EPA ICR Number 1131.10,

OMB Control Number 2060–0054, expiration December 31, 2011.

Affected Entities: Entities potentially affected by this action are the owners or operators of glass manufacturing plants.

Abstract: The affected entities are subject to the General Provisions of the NSPS at 40 CFR part 60, subpart A, and any changes or additions to the General Provisions specified at 40 CFR part 60, subpart CC.

Owners or operators of the affected facilities must submit initial notification, performance tests, and periodic reports and results. Owners or operators are also required to maintain records of the occurrence and duration of any startup, shutdown, or malfunction in the operation of an affected facility, or any period during which the monitoring system is inoperative. Reports, at a minimum, are required semiannually.

Burden Statement: The annual public reporting and recordkeeping burden for this collection of information is estimated to average 8 hours per response.

Respondents/Affected Entities: Glass manufacturing plants.

Estimated Number of Respondents: 41.

Frequency of Response: Occasionally, semiannually, and annually.

Estimated Total Annual Hour Burden: 803.

Estimated Total Annual Cost: $302,600, which includes $64,800 in labor costs, no capital/startup costs, and $237,800 in operating and maintenance costs.

(14) NSPS for Petroleum Refineries (40 CFR Part 60, Subpart J), Docket ID Number: EPA–HQ–OECA–2011–0222, EPA ICR Number 1054.11, OMB Control Number 2060–0022, expiration December 31, 2011.

Affected Entities: Entities potentially affected by this action are the owners or operators of petroleum refineries.

Abstract: The affected entities are subject to the General Provisions of the NSPS at 40 CFR part 60, subpart A, and any changes, or additions to the General Provisions specified at 40 CFR part 60, subpart J.

Owners or operators of the affected facilities must submit initial notification, performance tests, and periodic reports and results. Owners or operators are also required to maintain records of the occurrence and duration of any startup, shutdown, or malfunction in the operation of an affected facility, or any period during which the monitoring system is inoperative. Reports, at a minimum, are required semiannually.

Burden Statement: The annual public reporting and recordkeeping burden for this collection of information is estimated to average 50 hours per response.

Respondents/Affected Entities: Owners or operators of Petroleum refineries.

Estimated Number of Respondents: 132.

Frequency of Response: Initially, occasionally, and semiannually.

Estimated Total Annual Hour Burden: 14,134.

Estimated Total Annual Cost: $1,682,453, which includes $1,140,989 in labor costs, no capital/startup costs, and $541,464 in operating and maintenance costs.

(15) NSPS for Bulk Gasoline Terminals (40 CFR Part 60, Subpart XX), Docket ID Number: EPA–HQ–OECA–2011–0223, EPA ICR Number 0664.10, OMB Control Number 2060–0006, expiration December 31, 2011.

Affected Entities: Entities potentially affected by this action are the owners or operators of bulk gasoline terminals.

Abstract: The affected entities are subject to the General Provisions of the NSPS at 40 CFR part 60, subpart A, and any changes, or additions to the General Provisions specified at 40 CFR part 60, subpart XX.

Owners or operators of the affected facilities must submit initial notification, performance tests, and periodic reports and results. Owners or operators are also required to maintain records of the occurrence and duration of any startup, shutdown, or malfunction in the operation of an affected facility, or any period during which the monitoring system is inoperative.

Burden Statement: The annual public reporting and recordkeeping burden for this collection of information is estimated to average 329 hours per response.

Respondents/Affected Entities: Bulk gasoline terminals.

Estimated Number of Respondents: 40.

Frequency of Response: Initially, and occasionally.

Estimated Total Annual Hour Burden: 13,165.

Estimated Total Annual Cost: $1,062,809, which includes $1,062,809 in labor costs, no capital/startup costs, and no operating and maintenance costs.

(16) NSPS for Calciners and Dryers in Mineral Industries (40 CFR Part 60, Subpart UUU), Docket ID Number: EPA–HQ–OECA–2011–0224, EPA ICR Number 0746.08, OMB Control Number 2060–0251, expiration December 31, 2011.

Affected Entities: Entities potentially affected by this action are the owners or operators of calciners and dryers in the mineral industries.

Abstract: The affected entities are subject to the General Provisions of the NSPS at 40 CFR part 60, subpart A, and any changes, or additions to the General Provisions specified at 40 CFR part 60, subpart UUU.

Owners or operators of the affected facilities must submit initial notification, performance tests, and periodic reports and results. Owners or operators are also required to maintain records of the occurrence and duration of any startup, shutdown, or malfunction in the operation of an affected facility, or any period during which the monitoring system is inoperative. Reports, at a minimum, are required semiannually.

Burden Statement: The annual public reporting and recordkeeping burden for this collection of information is estimated to average 20 hours per response.

Respondents/Affected Entities: Calciners and dryers in the mineral industries.

Estimated Number of Respondents: 167.

Frequency of Response: Initially, occasionally, and semiannually.

Estimated Total Annual Hour Burden: 6,955.

Estimated Total Annual Cost: $674,485, which includes $561,485 in labor costs, $4,000 in capital/startup costs, and $109,000 in operating and maintenance costs.

(17) NSPS for Municipal Solid Waste Landfills (40 CFR Part 60, Subpart WWW), Docket ID Number: EPA–HQ–OECA–2011–0225, EPA ICR Number 1557.08, OMB Control Number 2060–0220, expiration December 31, 2011.

Affected Entities: Entities potentially affected by this action are the owners or operators of municipal solid waste landfills.

Abstract: The affected entities are subject to the General Provisions of the NSPS at 40 CFR part 60, subpart A, and any changes, or additions to the General Provisions specified at 40 CFR part 60, subpart WWW.

Owners or operators of the affected facilities must submit initial notification, performance tests, and periodic reports and results. Owners or operators are also required to maintain records of the occurrence and duration of any startup, shutdown, or malfunction in the operation of an affected facility, or any period during which the monitoring system is inoperative.

Burden Statement: The annual public reporting and recordkeeping burden for this collection of information is estimated to average 17 hours per response.

Respondents/Affected Entities: Municipal solid waste landfills.

Estimated Number of Respondents: 175.

Frequency of Response: Occasionally, initially, and annually.

Estimated Total Annual Hour Burden: 3,548.

Estimated Total Annual Cost: $2,133,921, which includes $2,113,271 in labor costs, no capital/startup costs, and $20,650 in operating and maintenance costs.

(18) NSPS for Metal Coil Surface Coating (40 CFR Part 60, Subpart TT), Docket ID Number: EPA–HQ–OECA–2011–0226, EPA ICR Number 0660.11, OMB Control Number 2060–0107, expiration December 31, 2011.

Affected Entities: Entities potentially affected by this action are the owners or operators of metal coil surface coating facilities.

Abstract: The affected entities are subject to the General Provisions of the NSPS at 40 CFR part 60, subpart A, and any changes, or additions to the General Provisions specified at 40 CFR part 60, subpart TT.

Owners or operators of the affected facilities must submit initial notification, performance tests, and periodic reports and results. Owners or operators are also required to maintain records of the occurrence and duration of any startup, shutdown, or malfunction in the operation of an affected facility, or any period during which the monitoring system is inoperative. Reports, at a minimum, are required semiannually.

Burden Statement: The annual public reporting and recordkeeping burden for this collection of information is estimated to average 41 hours per response.

Respondents/Affected Entities: Metal coil surface coating facilities

Estimated Number of Respondents: 158.

Frequency of Response: Initially, occasionally, annually, and semiannually.

Estimated Total Annual Hour Burden: 15,643.

Estimated Total Annual Cost: $1,594,680, which includes $1,262,880 in labor costs, no capital/startup costs, and $331,800 in operating and maintenance costs.

(19) NSPS for Petroleum Refineries (40 CFR Part 60, Subpart Ja), Docket ID Number: EPA–HQ–OECA–2011–0228, EPA ICR Number 2263.03, OMB Control Number 2060–0602, expiration December 31, 2011.

Affected Entities: Entities potentially affected by this action are the owners or operators of petroleum refineries.

Abstract: The affected entities are subject to the General Provisions of the NSPS at 40 CFR part 60, subpart A, and any changes, or additions to the General Provisions specified at 40 CFR part 60, subpart Ja.

Owners or operators of the affected facilities must submit initial notification, performance tests, and periodic reports and results. Owners or operators are also required to maintain records of the occurrence and duration of any startup, shutdown, or malfunction in the operation of an affected facility, or any period during which the monitoring system is inoperative. Reports, at a minimum, are required semiannually.

Burden Statement: The annual public reporting and recordkeeping burden for this collection of information is estimated to average 148 hours per response.

Respondents/Affected Entities: Owners or operators of clay ceramics manufacturing, glass manufacturing, and secondary nonferrous metals processing area sources.

Estimated Number of Respondents: 18.

Frequency of Response: Initially, semiannually, and occasionally.

Estimated Total Annual Hour Burden: 5,340.

Estimated Total Annual Cost: $3,169,440, which includes $2,052,000 in labor costs, no capital/startup costs, and $1,117,440 in operating and maintenance costs.

(20) NESHAP for Iron and Steel Foundries area Sources (40 CFR Part 63, Subpart ZZZZZ), Docket ID Number: EPA–HQ–OECA–2011–0229, EPA ICR Number 2267.03, OMB Control Number 2060–0605, expiration December 31, 2011.

Affected Entities: Entities potentially affected by this action are the owners or operators of iron and steel foundries that are area sources.

Abstract: The affected entities are subject to the General Provisions of the NESHAP at 40 CFR part 63, subpart A, and any changes, or additions to the General Provisions specified at 40 CFR part 63, subpart ZZZZZ.

Owners or operators of the affected facilities must submit initial notification, performance tests, and periodic reports and results. Owners or operators are also required to maintain records of the occurrence and duration of any startup, shutdown, or malfunction in the operation of an affected facility, or any period during which the monitoring system is inoperative. Reports, at a minimum, are required semiannually.

Burden Statement: The annual public reporting and recordkeeping burden for this collection of information is estimated to average 16 hours per response.

Respondents/Affected Entities: Owners or operators of iron and steel foundries area sources.

Estimated Number of Respondents: 427.

Frequency of Response: Initially, and semiannually.

Estimated Total Annual Hour Burden: 6,024.

Estimated Total Annual Cost: $429,208, which includes $420,718 in labor costs, $8,490 in capital/startup costs, and no operating and maintenance costs.

(21) NESHAP for Source Categories: Gasoline Distribution Bulk Terminals, Bulk Plants, Pipeline Facilities and Gasoline Dispensing Facilities (40 CFR Part 63, Subparts BBBBBB, and CCCCCC), Docket ID Number: EPA–HQ–OECA–2011–0230, EPA ICR Number 2237.03.10, OMB Control Number 2060–062–0, expiration December 31, 2011.

Affected Entities: Entities potentially affected by this action are the owners or operators of gasoline distribution bulk terminals, bulk plants, pipeline facilities, and gasoline dispensing facilities.

Abstract: The affected entities are subject to the General Provisions of the NESHAP at 40 CFR part 63, subpart A, and any changes, or additions to the General Provisions specified at 40 CFR part 63, subparts BBBBBB, and CCCCCC.

Owners or operators of the affected facilities must submit initial notification, performance tests, and periodic reports and results. Owners or operators are also required to maintain records of the occurrence and duration of any startup, shutdown, or malfunction in the operation of an affected facility, or any period during which the monitoring system is inoperative. Reports, at a minimum, are required semiannually.

Burden Statement: The annual public reporting and recordkeeping burden for this collection of information is estimated to average 10 hours per response.

Respondents/Affected Entities: Owners or operators of gasoline distribution bulk terminals, bulk plants, pipeline facilities and gasoline dispensing facilities.

Estimated Number of Respondents: 9,863.

Frequency of Response: Initially and semiannually.

Estimated Total Annual Hour Burden: 129,723.

Estimated Total Annual Cost: $8,437,493, which includes $8,327,493 in labor costs, no capital/startup costs, and $110,000 in operating and maintenance costs.

(22) NESHAP for Ferroalloys Production: Ferromanganese and Silicomanganese (40 CFR Part 63, Subpart XXX), Docket ID Number: EPA–HQ–OECA–2011–0231, EPA ICR Number 1831.05, OMB Control Number 2060–0391, expiration January 31, 2012.

Affected Entities: Entities potentially affected by this action are the owners or operators of ferroalloys production: Ferromanganese, and silicomanganese.

Abstract: The affected entities are subject to the General Provisions of the NESHAP at 40 CFR part 63, subpart A, and any changes, or additions to the General Provisions specified at 40 CFR part 63, subpart XXX.

Owners or operators of the affected facilities must submit initial notification, performance tests, and periodic reports and results. Owners or operators are also required to maintain records of the occurrence and duration of any startup, shutdown, or malfunction in the operation of an affected facility, or any period during which the monitoring system is inoperative. Reports, at a minimum, are required semiannually.

Burden Statement: The annual public reporting and recordkeeping burden for this collection of information is estimated to average 83 hours per response.

Respondents/Affected Entities: Owners or operators of ferroalloys production: Ferromanganese and silicomanganese.

Estimated Number of Respondents: 1.

Frequency of Response: Initially, semiannually and annually.

Estimated Total Annual Hour Burden: 548.

Estimated Total Annual Cost: $37,129, which includes $37,129 in labor costs, no capital/startup costs, and no operating and maintenance costs.

(23) NESHAP for Metal Coil Surface Coating Plants (40 CFR Part 63, Subpart SSSS), Docket ID Number: EPA–HQ–OECA–2011–0232, EPA ICR Number 1957.06, OMB Control Number 2060–0487, expiration January 31, 2012.

Affected Entities: Entities potentially affected by this action are the owners or operators of metal coil surface coating plants.

Abstract: The affected entities are subject to the General Provisions of the NESHAP at 40 CFR part 63, subpart A, and any changes, or additions to the General Provisions specified at 40 CFR part 63, subpart SSSS.

Owners or operators of the affected facilities must submit initial notification, performance tests, and periodic reports and results. Owners or operators are also required to maintain records of the occurrence and duration of any startup, shutdown, or malfunction in the operation of an affected facility, or any period during which the monitoring system is inoperative. Reports, at a minimum, are required semiannually.

Burden Statement: The annual public reporting and recordkeeping burden for this collection of information is estimated to average 119 hours per response.

Respondents/Affected Entities: Owners or operators of metal coil surface coating plants.

Estimated Number of Respondents: 89.

Frequency of Response: Initially, weekly, annually, semiannually and occasionally.

Estimated Total Annual Hour Burden: 19,901.

Estimated Total Annual Cost: $1,592,013, which includes $588,365 in labor costs, no capital/startup costs, and $3,648 in operating and maintenance costs.

(24) NESHAP for Plating and Polishing Area Sources (40 CFR Part 63, Subpart WWWWWW), Docket ID Number: EPA–HQ–OECA–2011–0233, EPA ICR Number 2294.03, OMB Control Number 2060–0622, expiration January 31, 2012.

Affected Entities: Entities potentially affected by this action are the owners or operators of plating and polishing operations.

Abstract: The affected entities are subject to the General Provisions of the NESHAP at 40 CFR part 63, subpart A, and any changes, or additions to the General Provisions specified at 40 CFR part 63, subpart WWWWWW.

Owners or operators of the affected facilities must submit initial notification, performance tests, and periodic reports and results. Owners or operators are also required to maintain records of the occurrence and duration of any startup, shutdown, or malfunction in the operation of an affected facility, or any period during which the monitoring system is inoperative. Reports, at a minimum, are required semiannually.

Burden Statement: The annual public reporting and recordkeeping burden for this collection of information is estimated to average 16 hours per response.

Respondents/Affected Entities: Owners or operators of plating and polishing operations.

Estimated Number of Respondents: 2,900.

Frequency of Response: Initially, and annually.

Estimated Total Annual Hour Burden: 33,290.

Estimated Total Annual Cost: $1,057,290, which includes $1,048,976 in labor costs, $8,314 capital/startup costs, and no operating and maintenance costs.

(25) NESHAP for Petroleum Refineries (40 CFR Part 63, Subpart CC), Docket ID Number: EPA–HQ–OECA–2011–0234, EPA ICR Number 1692.07, OMB Control Number 2060–0340, expiration February 29, 2012.

Affected Entities: Entities potentially affected by this action are the owners or operators of petroleum refineries plants.

Abstract: The affected entities are subject to the General Provisions of the NESHAP at 40 CFR part 63, subpart A, and any changes, or additions to the General Provisions specified at 40 CFR part 63, subpart CC.

Owners or operators of the affected facilities must submit initial notification, performance tests, and periodic reports and results. Owners or operators are also required to maintain records of the occurrence and duration of any startup, shutdown, or malfunction in the operation of an affected facility, or any period during which the monitoring system is inoperative. Reports, at a minimum, are required semiannually.

Burden Statement: The annual public reporting and recordkeeping burden for this collection of information is estimated to average 409 hours per response.

Respondents/Affected Entities: Petroleum refineries plants.

Estimated Number of Respondents: 154.

Frequency of Response: Occasionally, annually, semiannually, and quarterly.

Estimated Total Annual Hour Burden: 425,536.

Estimated Total Annual Cost: $40,459,011, which includes $38,075,660 in labor costs, $2,321,640 in capital/startup costs, and $61,711 in operating and maintenance costs.

(26) NESHAP for Source Categories: Generic Maximum Achievable Control Technology Standards for Carbon Black, Ethylene, Cyanide and Spandex (40 CFR Part 63, Subpart YY), Docket ID Number: EPA–HQ–OECA–2011–0235, EPA ICR Number 1983.06, OMB Control Number 2060–0489, expiration March 31, 2012.

Affected Entities: Entities potentially affected by this action are the owners or operators of source categories: Generic maximum achievable control technology standards for carbon black, ethylene, cyanide and spandex facilities.

Abstract: The affected entities are subject to the General Provisions of the NESHAP at 40 CFR part 63, subpart A, and any changes, or additions to the General Provisions specified at 40 CFR part 63, subpart YY.

Owners or operators of the affected facilities must submit initial notification, performance tests, and periodic reports and results. Owners or operators are also required to maintain records of the occurrence and duration of any startup, shutdown, or malfunction in the operation of an affected facility, or any period during which the monitoring system is inoperative. Reports, at a minimum, are required semiannually.

Burden Statement: The annual public reporting and recordkeeping burden for this collection of information is estimated to average 90 hours per response.

Respondents/Affected Entities: Source categories: generic maximum achievable control technology standards for carbon black, ethylene, cyanide and spandex facilities.

Estimated Number of Respondents: 72.

Frequency of Response: Annually, semiannually, and occasionally.

Estimated Total Annual Hour Burden: 13,533.

Estimated Total Annual Cost: $1,439,214, which includes $1,080,149 in labor costs, no capital/startup costs, and $359,065 in operating and maintenance costs.

(27) NESHAP for Ferroalloys Production Area Sources (40 CFR Part 63, Subpart YYYYYY), Docket ID Number: EPA–HQ–OECA–2011–0236, EPA ICR Number 2303.03, OMB Control Number 2060–0625, expiration March 31, 2012.

Affected Entities: Entities potentially affected by this action are the owners or operators of ferroalloys production area sources facilities.

Abstract: The affected entities are subject to the General Provisions of the NESHAP at 40 CFR part 63, subpart A, and any changes, or additions to the General Provisions specified at 40 CFR part 63, subpart YYYYYY.

Owners or operators of the affected facilities must submit initial notification, performance tests, and periodic reports and results. Owners or operators are also required to maintain records of the occurrence and duration of any startup, shutdown, or malfunction in the operation of an affected facility, or any period during which the monitoring system is inoperative.

Burden Statement: The annual public reporting and recordkeeping burden for this collection of information is estimated to average 39 hours per response.

Respondents/Affected Entities: Ferroalloys production area sources facilities.

Estimated Number of Respondents: 10.

Frequency of Response: Initially, and annually.

Estimated Total Annual Hour Burden: 387.

Estimated Total Annual Cost: $64,429, which includes $64,429 in labor costs, no capital/startup costs, and no operating and maintenance costs.

(28) NESHAP for Natural Gas Transmission and Storage (40 CFR Part 63, Subpart HHH), Docket ID Number: EPA–HQ–OECA–2011–0238, EPA ICR Number 1789.07, OMB Control Number 2060–0418, expiration April 30, 2012.

Affected Entities: Entities potentially affected by this action are the owners or operators of natural gas transmission and storage facilities.

Abstract: The affected entities are subject to the General Provisions of the NESHAP at 40 CFR part 63, subpart A, and any changes, or additions to the General Provisions specified at 40 CFR part 63, subpart HHH.

Owners or operators of the affected facilities must submit initial notification, performance tests, and periodic reports and results. Owners or operators are also required to maintain records of the occurrence and duration of any startup, shutdown, or malfunction in the operation of an affected facility, or any period during which the monitoring system is inoperative. Reports, at a minimum, are required semiannually.

Burden Statement: The annual public reporting and recordkeeping burden for this collection of information is estimated to average 15 hours per response.

Respondents/Affected Entities: Natural gas transmission and storage facilities.

Estimated Number of Respondents: 832.

Frequency of Response: Initially, occasionally, and semiannually.

Estimated Total Annual Hour Burden: 753.

Estimated Total Annual Cost: $61,085, which includes $61,085 in labor costs, no capital/startup costs, and no operating and maintenance costs.

(29) NSPS for Grain Elevators (40 CFR Part 60, Subpart DD), Docket ID Number: EPA–HQ–OECA–2011–0239, EPA ICR Number 1130.10, OMB Control Number 2060–0082, expiration April 30, 2012.

Affected Entities: Entities potentially affected by this action are the owners or operators of grain elevators.

Abstract: The affected entities are subject to the General Provisions of the NESHAP at 40 CFR part 60, subpart A, and any changes, or additions to the General Provisions specified at 40 CFR part 60, subpart DD.

Owners or operators of the affected facilities must submit initial notification, performance tests, and periodic reports and results. Owners or operators are also required to maintain records of the occurrence and duration of any startup, shutdown, or malfunction in the operation of an affected facility, or any period during which the monitoring system is inoperative.

Burden Statement: The annual public reporting and recordkeeping burden for this collection of information is estimated to average 10 hours per response.

Respondents/Affected Entities: Grain elevators.

Estimated Number of Respondents: 200.

Frequency of Response: Occasionally, initially, and annually.

Estimated Total Annual Hour Burden: 2,070.

Estimated Total Annual Cost: $167,108, which includes $167,108 in labor costs, no capital/startup costs, and no operating and maintenance costs.

(30) NSPS for Lime Manufacturing (40 CFR Part 60, Subpart HH), Docket ID Number: EPA–HQ–OECA–2011–0240, EPA ICR Number 1167.10, OMB Control Number 2060–0063, expiration April 30, 2012.

Affected Entities: Entities potentially affected by this action are the owners or operators of lime production facilities.

Abstract: The affected entities are subject to the General Provisions of the NSPS at 40 CFR part 60, subpart A, and any changes, or additions to the General Provisions specified at 40 CFR part 60, subpart HH.

Owners or operators of the affected facilities must submit initial notification, performance tests, and periodic reports and results. Owners or operators are also required to maintain records of the occurrence and duration of any startup, shutdown, or malfunction in the operation of an affected facility, or any period during which the monitoring system is

inoperative. Reports, at a minimum, are required semiannually.

Burden Statement: The annual public reporting and recordkeeping burden for this collection of information is estimated to average 46 hours per response.

Respondents/Affected Entities: Lime production facilities.

Estimated Number of Respondents: 41.

Frequency of Response: Initially, occasionally, and semiannually.

Estimated Total Annual Hour Burden: 3,773.

Estimated Total Annual Cost: $366,056, which includes $304,556 in labor costs, no capital/startup costs, and $61,500 in operating and maintenance costs.

(31) NSPS for Hot Mix Asphalt Facilities (40 CFR Part 60, Subpart I), Docket ID Number: EPA–HQ–OECA–2011–0241, EPA ICR Number 1127.10, OMB Control Number 2060–0083, expiration April 30, 2012.

Affected Entities: Entities potentially affected by this action are the owners or operators of hot mix asphalt facilities.

Abstract: The affected entities are subject to the General Provisions of the NSPS at 40 CFR part 60, subpart A, and any changes, or additions to the General Provisions specified at 40 CFR part 60, subpart I.

Owners or operators of the affected facilities must submit initial notification, performance tests, and periodic reports and results. Owners or operators are also required to maintain records of the occurrence and duration of any startup, shutdown, or malfunction in the operation of an affected facility, or any period during which the monitoring system is inoperative.

Burden Statement: The annual public reporting and recordkeeping burden for this collection of information is estimated to average 2 hours per response.

Respondents/Affected Entities: Owners or operators of hot mix asphalt facilities.

Estimated Number of Respondents: 4,010.

Frequency of Response: Initially, and occasionally.

Estimated Total Annual Hour Burden: 17,740.

Estimated Total Annual Cost: $1,431,455, which includes $1,431,455 in labor costs, no capital/startup costs and no operating and maintenance costs.

(32) NSPS for Kraft Pulp Mills (40 CFR Part 60, Subpart BB), Docket ID Number: EPA–HQ–OECA–2011–0242, EPA ICR Number 1055.10, OMB Control Number 2060–0021, expiration April 30, 2012.

Affected Entities: Entities potentially affected by this action are the owners or operators of kraft pulp mills.

Abstract: The affected entities are subject to the General Provisions of the NSPS at 40 CFR part 60, subpart A, and any changes, or additions to the General Provisions specified at 40 CFR part 60, subpart BB.

Owners or operators of the affected facilities must submit initial notification, performance tests, and periodic reports and results. Owners or operators are also required to maintain records of the occurrence and duration of any startup, shutdown, or malfunction in the operation of an affected facility, or any period during which the monitoring system is inoperative. Reports are also required, at a minimum, semiannually.

Burden Statement: The annual public reporting and recordkeeping burden for this collection of information is estimated to average 37 hours per response.

Respondents/Affected Entities: Owners or operators of kraft pulp mills.

Estimated Number of Respondents: 15,235.

Frequency of Response: Initially, occasionally, and semiannually.

Estimated Total Annual Hour Burden: 15,235.

Estimated Total Annual Cost: $5,194,799, which includes $1,229,899 in labor costs, $344,900 in capital/startup costs and $3,620,000 in operating and maintenance costs.

(33) NESHAP for Coke Oven Batteries (40 CFR Part 63, Subpart L), Docket ID Number: EPA–HQ–OECA–2011–0243, EPA ICR Number 1362.09, OMB Control Number 2060–0253, expiration May 31, 2012.

Affected Entities: Entities potentially affected by this action are the owners or operators of coke oven batteries.

Abstract: The affected entities are subject to the General Provisions of the NESHAP at 40 CFR part 63, subpart A, and any changes, or additions to the General Provisions specified at 40 CFR part 63, subpart L.

Owners or operators of the affected facilities must submit initial notification, performance tests, and periodic reports and results. Owners or operators are also required to maintain records of the occurrence and duration of any startup, shutdown, or malfunction in the operation of an affected facility, or any period during which the monitoring system is inoperative. Reports, at a minimum, are required semiannually.

Burden Statement: The annual public reporting and recordkeeping burden for this collection of information is estimated to average 1,908 hours per response.

Respondents/Affected Entities: Owners or operators of coke oven batteries.

Estimated Number of Respondents: 19.

Frequency of Response: Initially, occasionally, and semiannually.

Estimated Total Annual Hour Burden: 80,121.

Estimated Total Annual Cost: $6,564,165, which includes $6,564,165 in labor costs, no capital/startup costs and no operating and maintenance costs.

(34) NESHAP for Polyether Polyols Production (40 CFR Part 63, Subpart PPP), Docket ID Number: EPA–HQ–OECA–2011–0244, EPA ICR Number 1811.07, OMB Control Number 2060–0415, expiration May 31, 2012.

Affected Entities: Entities potentially affected by this action are the owners or operators of polyether polyols production.

Abstract: The affected entities are subject to the General Provisions of the NESHAP at 40 CFR part 62, subpart A, and any changes, or additions to the General Provisions specified at 40 CFR part 63, subpart PPP.

Owners or operators of the affected facilities must submit initial notification, performance tests, and periodic reports and results. Owners or operators are also required to maintain records of the occurrence and duration of any startup, shutdown, or malfunction in the operation of an affected facility, or any period during which the monitoring system is inoperative. Reports, at a minimum, are required semiannually.

Burden Statement: The annual public reporting and recordkeeping burden for this collection of information is estimated to average 72 hours per response.

Respondents/Affected Entities: Owners or operators of polyether polyols production.

Estimated Number of Respondents: 82.

Frequency of Response: Initially, annually, and semiannually.

Estimated Total Annual Hour Burden: 13,042.

Estimated Total Annual Cost: $1,243,954, which includes $1,040,942 in labor costs, $203,012 in capital/startup costs and no operating and maintenance costs.

(35) NESHAP for Inorganic Arsenic Emissions from Glass Manufacturing Plants (40 CFR Part 61, Subpart N),

Docket ID Number: EPA–HQ–OECA–2011–0245, EPA ICR Number 1081.10, OMB Control Number 2060–0043, expiration May 31, 2012.

Affected Entities: Entities potentially affected by this action are the owners or operators of inorganic arsenic emissions from glass manufacturing plants.

Abstract: The affected entities are subject to the General Provisions of the NESHAP at 40 CFR part 61, subpart A, and any changes, or additions to the General Provisions specified at 40 CFR part 61, subpart N.

Owners or operators of the affected facilities must submit initial notification, performance tests, and periodic reports and results. Owners or operators are also required to maintain records of the occurrence and duration of any startup, shutdown, or malfunction in the operation of an affected facility, or any period during which the monitoring system is inoperative. Reports, at a minimum, are required semiannually.

Burden Statement: The annual public reporting and recordkeeping burden for this collection of information is estimated to average 49 hours per response.

Respondents/Affected Entities: Owners or operators of inorganic arsenic emissions from glass manufacturing plants.

Estimated Number of Respondents: 16.

Frequency of Response: Initially, occasionally, annually, and semiannually.

Estimated Total Annual Hour Burden: 3,098.

Estimated Total Annual Cost: $306,106, which includes $250,106 in labor costs, no capital/startup costs and $56,000 in operating and maintenance costs.

(36) NESHAP for Primary Lead Smelters (40 CFR Part 63, Subpart TTT), Docket ID Number: EPA–HQ–OECA–2011–0246, EPA ICR Number 1856.08, OMB Control Number 2060–0414, expiration May 31, 2012.

Affected Entities: Entities potentially affected by this action are the owners or operators of primary lead smelters.

Abstract: The affected entities are subject to the General Provisions of the NESHAP at 40 CFR part 63, subpart A, and any changes, or additions to the General Provisions specified at 40 CFR part 63, subpart TTT.

Owners or operators of the affected facilities must submit initial notification, performance tests, and periodic reports and results. Owners or operators are also required to maintain records of the occurrence and duration of any startup, shutdown, or malfunction in the operation of an affected facility, or any period during which the monitoring system is inoperative. Reports, at a minimum, are required semiannually.

Burden Statement: The annual public reporting and recordkeeping burden for this collection of information is estimated to average 3,048 hours per response.

Respondents/Affected Entities: Owners or operators of primary lead smelters.

Estimated Number of Respondents: 2.

Frequency of Response: Initially, occasionally, annually, and semiannually.

Estimated Total Annual Hour Burden: 12,190.

Estimated Total Annual Cost: $1,003,082, which includes $984,082 in labor costs, no capital/startup costs and $19,000 in operating and maintenance costs.

(37) NESHAP for Steel Pickling, HCL Processing Facilities and Hydrochloric Acid Regeneration (40 CFR Part 63, Subpart CCC), Docket ID Number: EPA–HQ–OECA–2011–0248, EPA ICR Number 1821.07, OMB Control Number 2060–0419, expiration May 31, 2012.

Affected Entities: Entities potentially affected by this action are the owners or operators of steel pickling, HCL process facilities and hydrochloric acid regeneration.

Abstract: The affected entities are subject to the General Provisions of the NESHAP at 40 CFR part 63, subpart A, and any changes, or additions to the General Provisions specified at 40 CFR part 63, subpart CCC.

Owners or operators of the affected facilities must submit initial notification, performance tests, and periodic reports and results. Owners or operators are also required to maintain records of the occurrence and duration of any startup, shutdown, or malfunction in the operation of an affected facility, or any period during which the monitoring system is inoperative. Reports, at a minimum, are required semiannually.

Burden Statement: The annual public reporting and recordkeeping burden for this collection of information is estimated to average 168 hours per response.

Respondents/Affected Entities: Owners or operators of steel pickling, HCL process facilities and hydrochloric acid regeneration plants.

Estimated Number of Respondents: 25,316.

Frequency of Response: Initially, occasionally, and semiannually.

Estimated Total Annual Hour Burden: 25,316.

Estimated Total Annual Cost: $2,283,406, which includes $2,275,774 in labor costs, no capital/startup costs and $7,632 in operating and maintenance costs.

(38) NSPS for Other Solid Waste Incineration Units (40 CFR Part 60, Subpart EEEE), Docket ID Number: EPA–HQ–OECA–2011–0249, EPA ICR Number 2163.04, OMB Control Number 2060–0563, expiration May 31, 2012.

Affected Entities: Entities potentially affected by this action are the owners or operators of other solid waste incineration units.

Abstract: The affected entities are subject to the General Provisions of the NSPS at 40 CFR part 60, subpart A, and any changes, or additions to the General Provisions specified at 40 CFR part 60, subpart EEEE.

Owners or operators of the affected facilities must submit initial notification, performance tests, and periodic reports and results. Owners or operators are also required to maintain records of the occurrence and duration of any startup, shutdown, or malfunction in the operation of an affected facility, or any period during which the monitoring system is inoperative. Reports, at a minimum, are required semiannually.

Burden Statement: The annual public reporting and recordkeeping burden for this collection of information is estimated to average 0 hours per response.

Respondents/Affected Entities: Owners or operators of other solid waste incineration units.

Estimated Number of Respondents: 0.

Frequency of Response: Initially, annually, and semiannually.

Estimated Total Annual Hour Burden: 0.

Estimated Total Annual Cost: $0, which includes no labor costs, no capital/startup costs, and no operating and maintenance costs.

(39) NESHAP for Wet-Formed Fiberglass Mat Production (40 CFR Part 63, Subpart HHHH), Docket ID Number: EPA–HQ–OECA–2011–0250, EPA ICR Number 1964.05, OMB Control Number 2060–0496, expiration June 30, 2012.

Affected Entities: Entities potentially affected by this action are the owners or operators of wet-formed fiberglass mat production.

Abstract: The affected entities are subject to the General Provisions of the NESHAP at 40 CFR part 63, subpart A, and any changes, or additions to the General Provisions specified at 40 CFR part 63, subpart HHHH.

Owners or operators of the affected facilities must submit initial notification, performance tests, and

periodic reports and results. Owners or operators are also required to maintain records of the occurrence and duration of any startup, shutdown, or malfunction in the operation of an affected facility, or any period during which the monitoring system is inoperative. Reports, at a minimum, are required semiannually.

Burden Statement: The annual public reporting and recordkeeping burden for this collection of information is estimated to average 61 hours per response.

Respondents/Affected Entities: Owners or operators of wet-formed fiberglass mat production.

Estimated Number of Respondents: 14.

Frequency of Response: Initially, occasionally, annually, and semiannually.

Estimated Total Annual Hour Burden: 1,966.

Estimated Total Annual Cost: $158,672, which includes $158,672 in labor costs, no capital/startup costs, and no operating and maintenance costs.

(40) NESHAP for Source Categories: Generic Maximum Achievable Control Technology Standards for Acetal Resin; Acrylic and Modacrylic Fiber; Hydrogen fluoride and Polycarbonate Production (40 CFR Part 63, Subpart YY), Docket ID Number: EPA–HQ–OECA–2011–0251, EPA ICR Number 1871.06, OMB Control Number 2060–0420, expiration June 30, 2012.

Affected Entities: Entities potentially affected by this action are the owners or operators of source categories: Generic maximum achievable control technology standards for acetal resin; acrylic and modacrylic fiber; hydrogen fluoride and polycarbonate production.

Abstract: The affected entities are subject to the General Provisions of the NESHAP at 40 CFR part 63, subpart A, and any changes, or additions to the General Provisions specified at 40 CFR part 63, subpart YY.

Owners or operators of the affected facilities must submit initial notification, performance tests, and periodic reports and results. Owners or operators are also required to maintain records of the occurrence and duration of any startup, shutdown, or malfunction in the operation of an affected facility, or any period during which the monitoring system is inoperative. Reports, at a minimum, are required semiannually.

Burden Statement: The annual public reporting and recordkeeping burden for this collection of information is estimated to average 133 hours per response.

Respondents/Affected Entities: Owners or operators of source categories: Generic maximum achievable control technology standards for acetal resin; acrylic and modacrylic fiber; hydrogen fluoride and polycarbonate production.

Estimated Number of Respondents: 10.

Frequency of Response: Initially, occasionally, and semiannually.

Estimated Total Annual Hour Burden: 4,004.

Estimated Total Annual Cost: $438,560, which includes $331,146 in labor costs, no capital/startup costs and $107,414 in operating and maintenance costs.

(41) NESHAP for Asbestos (40 CFR Part 61, Subpart M), Docket ID Number: EPA–HQ–OECA–2011–0252, EPA ICR Number 0111.13, OMB Control Number 2060–0101, expiration June 30, 2012.

Affected Entities: Entities potentially affected by this action are the owners or operators of demolition and renovation of facilities; the disposal of asbestos waste; asbestos milling, manufacturing and fabricating; the use of asbestos on roadways; asbestos waste conversion facilities; and sprayed-on materials.

Abstract: The affected entities are subject to the General Provisions of the NESHAP at 40 CFR part 60, subpart A, and any changes, or additions to the General Provisions specified at 40 CFR part 61, subpart M.

Owners or operators of the affected facilities must submit initial notification, performance tests, and periodic reports and results. Owners or operators are also required to maintain records of the occurrence and duration of any startup, shutdown, or malfunction in the operation of an affected facility, or any period during which the monitoring system is inoperative. Reports, at a minimum, are required semiannually.

Burden Statement: The annual public reporting and recordkeeping burden for this collection of information is estimated to average 2 hours per response.

Respondents/Affected Entities: Owners or operators of demolition and renovation of facilities; the disposal of asbestos waste; asbestos milling, manufacturing and fabricating; the use of asbestos on roadways; asbestos waste conversion facilities; and the use of asbestos insulation and sprayed-on materials.

Estimated Number of Respondents: 9,432.

Frequency of Response: Initially, occasionally, and semiannually.

Estimated Total Annual Hour Burden: 229,381.

Estimated Total Annual Cost: $18,517,636, which includes $18,517,636 in labor costs, no capital/startup costs, and no operating and maintenance costs.

(42) NSPS for Nonmetallic Mineral Processing (40 CFR Part 60, Subpart OOO), Docket ID Number: EPA–HQ–OECA–2011–0253, EPA ICR Number 1084.11, OMB Control Number 2060–0050, expiration June 30, 2012.

Affected Entities: Entities potentially affected by this action are the owners or operators of nonmetallic mineral processing facilities.

Abstract: The affected entities are subject to the General Provisions of the NSPS at 40 CFR part 60, subpart A, and any changes, or additions to the General Provisions specified at 40 CFR part 60, subpart OOO.

Owners or operators of the affected facilities must submit initial notification, performance tests, and periodic reports and results. Owners or operators are also required to maintain records of the occurrence and duration of any startup, shutdown, or malfunction in the operation of an affected facility, or any period during which the monitoring system is inoperative.

Burden Statement: The annual public reporting and recordkeeping burden for this collection of information is estimated to average 2.3 hours per response.

Respondents/Affected Entities: Owners or operators of hot mix asphalt facilities.

Estimated Number of Respondents: 4,365.

Frequency of Response: Initially, and occasionally.

Estimated Total Annual Hour Burden: 11,330.

Estimated Total Annual Cost: $1,185,219, which includes $1,030,642 in labor costs, $154,577 in capital/startup costs and no operating and maintenance costs.

(43) NESHAP for Miscellaneous Metal Parts and Products (40 CFR Part 63, Subpart MMMM), Docket ID Number: EPA–HQ–OECA–2011–0254, EPA ICR Number 2056.04, OMB Control Number 2060–0486, expiration July 31, 2012.

Affected Entities: Entities potentially affected by this action are the owners or operators of miscellaneous metal parts and products facilities.

Abstract: The affected entities are subject to the General Provisions of the NESHAP at 40 CFR part 63, subpart A, and any changes, or additions to the General Provisions specified at 40 CFR part 63, subpart MMMM.

Owners or operators of the affected facilities must submit initial

notification, performance tests, and periodic reports and results. Owners or operators are also required to maintain records of the occurrence and duration of any startup, shutdown, or malfunction in the operation of an affected facility, or any period during which the monitoring system is inoperative. Reports, at a minimum, are required semiannually.

Burden Statement: The annual public reporting and recordkeeping burden for this collection of information is estimated to average 233 hours per response.

Respondents/Affected Entities: Owners or operators of miscellaneous metal parts and products.

Estimated Number of Respondents: 4,991.

Frequency of Response: Initially, occasionally, and semiannually.

Estimated Total Annual Hour Burden: 2,328,603.

Estimated Total Annual Cost: $212,456,370, which includes $211,456,370 in labor costs, no capital/startup costs and $1,000,000 in operating and maintenance costs.

(44) NESHAP for Flexible Polyurethane Foam Fabrication (40 CFR Part 63, Subpart MMMMM), Docket ID Number: EPA–HQ–OECA–2011–0255, EPA ICR Number 2027.05, OMB Control Number 2060–0516, expiration July 31, 2012.

Affected Entities: Entities potentially affected by this action are the owners or operators of flexible polyurethane foam fabrication facilities.

Abstract: The affected entities are subject to the General Provisions of the NESHAP at 40 CFR part 63, subpart A, and any changes, or additions to the General Provisions specified at 40 CFR part 63, subpart MMMMM.

Owners or operators of the affected facilities must submit initial notification, performance tests, and periodic reports and results. Owners or operators are also required to maintain records of the occurrence and duration of any startup, shutdown, or malfunction in the operation of an affected facility, or any period during which the monitoring system is inoperative. Reports, at a minimum, are required semiannually.

Burden Statement: The annual public reporting and recordkeeping burden for this collection of information is estimated to average 90 hours per response.

Respondents/Affected Entities: Owners or operators of flexible polyurethane foam fabrication.

Estimated Number of Respondents: 11.

Frequency of Response: Initially, occasionally, annually, and semiannually.

Estimated Total Annual Hour Burden: 12,303.

Estimated Total Annual Cost: $1,004,834, which includes $1,002,163 in labor costs, $997 in capital/startup costs and $1,674 in operating and maintenance costs.

(45) Emission Guidelines for Existing Other Solid Waste Incineration Units (40 CFR Part 60, Subpart FFFF), Docket ID Number: EPA–HQ–OECA–2011–0256, EPA ICR Number 2164.04, OMB Control Number 2060–0562, expiration July 31, 2012.

Affected Entities: Entities potentially affected by this action are the owners or operators of other existing solid waste incinerators.

Abstract: This supporting statement addresses information collection activities imposed by the Emission Guidelines for Other Solid Waste Incineration (OSWI) Units (40 CFR part 60, subpart FFFF). The emission guidelines address existing OSWI units that commenced construction before proposal of the emission guidelines (December 9, 2004). The emission guidelines do not apply directly to existing OSWI unit owners and operators.

The emission guidelines can be considered a model regulation that a State agency can use in developing plans to implement the emission guidelines. If a State does not develop, adopt, and submit an approvable State plan, the Federal government must develop a plan to implement the emission guidelines. This ICR includes the burden for an affected entity even if it is ultimately regulated under a State or Federal plan.

Burden Statement: The annual public reporting and recordkeeping burden for this collection of information is estimated to average 237 hours per response.

Respondents/Affected Entities: Owners or operators of other existing solid waste incinerators.

Estimated Number of Respondents: 248.

Frequency of Response: Initially, annually, and semiannually.

Estimated Total Annual Hour Burden: 176,576.

Estimated Total Annual Cost: $17,181,351, which includes $15,941,351 in labor costs, no capital/startup costs and $1,240,000 in operating and maintenance costs.

(46) NESHAP for Reinforced Plastic Composites Production (40 CFR Part 63, Subpart WWWW), Docket ID Number: EPA–HQ–OECA–2011–0257, EPA ICR Number 1976.05, OMB Control Number 2060–0509, expiration July 31, 2012.

Affected Entities: Entities potentially affected by this action are the owners or operators of reinforced plastic composites production facilities.

Abstract: The affected entities are subject to the General Provisions of the NESHAP at 40 CFR part 63, subpart A, and any changes, or additions to the General Provisions specified at 40 CFR part 63, subpart WWWW.

Owners or operators of the affected facilities must submit initial notification, performance tests, and periodic reports and results. Owners or operators are also required to maintain records of the occurrence and duration of any startup, shutdown, or malfunction in the operation of an affected facility, or any period during which the monitoring system is inoperative. Reports, at a minimum, are required semiannually.

Burden Statement: The annual public reporting and recordkeeping burden for this collection of information is estimated to average 16 hours per response.

Respondents/Affected Entities: Owners or operators of reinforced plastic composites production facilities.

Estimated Number of Respondents: 504.

Frequency of Response: Initially, and semiannually.

Estimated Total Annual Hour Burden: 17,740.

Estimated Total Annual Cost: $1,454,143, which includes $1,432,143 in labor costs, no capital/startup costs and $22,000 in operating and maintenance costs.

(47) NESHAP for Paper and Other Web Coating (40 CFR Part 63, Subpart JJJJ), Docket ID Number: EPA–HQ–OECA–2011–0258, EPA ICR Number 1951.05, OMB Control Number 2060–0511, expiration July 31, 2012.

Affected Entities: Entities potentially affected by this action are the owners or operators of paper and other web coating facilities.

Abstract: The affected entities are subject to the General Provisions of the NESHAP at 40 CFR part 63, subpart A, and any changes, or additions to the General Provisions specified at 40 CFR part 63, subpart JJJJ.

Owners or operators of the affected facilities must submit initial notification, performance tests, and periodic reports and results. Owners or operators are also required to maintain records of the occurrence and duration of any startup, shutdown, or malfunction in the operation of an affected facility, or any period during which the monitoring system is

inoperative. Reports, at a minimum, are required semiannually.

Burden Statement: The annual public reporting and recordkeeping burden for this collection of information is estimated to average 23 hours per response.

Respondents/Affected Entities: Owners or operators of paper and other coating facilities.

Estimated Number of Respondents: 215.

Frequency of Response: Initially, occasionally, monthly, and semiannually.

Estimated Total Annual Hour Burden: 11,312.

Estimated Total Annual Cost: $1,765,629, which includes $913,229 in labor costs, $233,500 in capital/startup costs and $618,900 in operating and maintenance costs.

(48) NESHAP for the Surface Coating of Large Household and Commercial appliances (40 CFR Part 63, Subpart NNNN), Docket ID Number: EPA–HQ–OECA–2011–0259, EPA ICR Number 1954.05, OMB Control Number 2060–0457, expiration July 31, 2012.

Affected Entities: Entities potentially affected by this action are the owners or operators of the surface coating of large household and commercial appliances facilities.

Abstract: The affected entities are subject to the General Provisions of the NESHAP at 40 CFR part 63, subpart A, and any changes, or additions to the General Provisions specified at 40 CFR part 63, subpart NNNN.

Owners or operators of the affected facilities must submit initial notification, performance tests, and periodic reports and results. Owners or operators are also required to maintain records of the occurrence and duration of any startup, shutdown, or malfunction in the operation of an affected facility, or any period during which the monitoring system is inoperative. Reports, at a minimum, are required semiannually.

Burden Statement: The annual public reporting and recordkeeping burden for this collection of information is estimated to average 97 hours per response.

Respondents/Affected Entities: Owners or operators of surface coating of large household and commercial appliances facilities.

Estimated Number of Respondents: 90.

Frequency of Response: Initially, occasionally, and semiannually.

Estimated Total Annual Hour Burden: 28,845.

Estimated Total Annual Cost: $2,498,984, which includes $2,326,984 in labor costs, $64,000 in capital/startup costs and $108,000 in operating and maintenance costs.

(49) NESHAP for Brick and Structural Clay Manufacturing (40 CFR Part 63, Subpart JJJJJ), Docket ID Number: EPA–HQ–OECA–2011–0260, EPA ICR Number 2022.05, OMB Control Number 2060–0508, expiration July 31, 2012.

Affected Entities: Entities potentially affected by this action are the owners or operators of brick and structural clay manufacturing facilities.

Abstract: The affected entities are subject to the General Provisions of the NESHAP at 40 CFR part 63, subpart A, and any changes, or additions to the General Provisions specified at 40 CFR part 63, subpart JJJJJ.

Owners or operators of the affected facilities must submit initial notification, performance tests, and periodic reports and results. Owners or operators are also required to maintain records of the occurrence and duration of any startup, shutdown, or malfunction in the operation of an affected facility, or any period during which the monitoring system is inoperative. Reports, at a minimum, are required semiannually.

Burden Statement: The annual public reporting and recordkeeping burden for this collection of information is estimated to average 85 hours per response.

Respondents/Affected Entities: Owners or operators of brick and structural clay manufacturing.

Estimated Number of Respondents: 72.

Frequency of Response: Initially, occasionally, and semiannually.

Estimated Total Annual Hour Burden: 14,086.

Estimated Total Annual Cost: $1,152,404, which includes $1,137,652 in labor costs, $10,000 in capital/startup costs and $4,752 in operating and maintenance costs.

(50) NESHAP for Refractory Products Manufacturing (40 CFR Part 63, Subpart SSSSS), Docket ID Number: EPA–HQ–OECA–2011–0261, EPA ICR Number 2040.05, OMB Control Number 2060–0515, expiration July 31, 2012.

Affected Entities: Entities potentially affected by this action are the owners or operators of refractory products manufacturing plants.

Abstract: The affected entities are subject to the General Provisions of the NESHAP at 40 CFR part 63, subpart A, and any changes, or additions to the General Provisions specified at 40 CFR part 63, subpart SSSSS.

Owners or operators of the affected facilities must submit initial notification, performance tests, and periodic reports and results. Owners or operators are also required to maintain records of the occurrence and duration of any startup, shutdown, or malfunction in the operation of an affected facility, or any period during which the monitoring system is inoperative. Reports, at a minimum, are required semiannually.

Burden Statement: The annual public reporting and recordkeeping burden for this collection of information is estimated to average 15 hours per response.

Respondents/Affected Entities: Owners or operators of refractory products manufacturing plants.

Estimated Number of Respondents: 8.

Frequency of Response: Initially, occasionally, and semiannually.

Estimated Total Annual Hour Burden: 338.

Estimated Total Annual Cost: $30,344, which includes $27,304 in labor costs, no capital/startup costs and $3,040 in operating and maintenance costs.

(51) NESHAP for Semiconductor Manufacturing (40 CFR Part 63, Subpart BBBBB), Docket ID Number: EPA–HQ–OECA–2011–0262, EPA ICR Number 2042.05, OMB Control Number 2060–0519, expiration July 31, 2012.

Affected Entities: Entities potentially affected by this action are the owners or operators of semiconductor manufacturing plants.

Abstract: The affected entities are subject to the General Provisions of the NESHAP at 40 CFR part 63, subpart A, and any changes, or additions to the General Provisions specified at 40 CFR part 63, subpart BBBBB.

Owners or operators of the affected facilities must submit initial notification, performance tests, and periodic reports and results. Owners or operators are also required to maintain records of the occurrence and duration of any startup, shutdown, or malfunction in the operation of an affected facility, or any period during which the monitoring system is inoperative. Reports, at a minimum, are required semiannually.

Burden Statement: The annual public reporting and recordkeeping burden for this collection of information is estimated to average 18 hours per response.

Respondents/Affected Entities: Owners or operators of semiconductor manufacturing plants.

Estimated Number of Respondents: 1.

Frequency of Response: Initially, occasionally, and semiannually.

Estimated Total Annual Hour Burden: 37.

Estimated Total Annual Cost: $3,167, which includes $3,117 in labor costs, no

capital/startup costs and $50 in operating and maintenance costs.

(52) NESHAP for Printing, Coating and Dyeing of Fabrics and Other Textiles (40 CFR Part 63, Subpart OOOO), Docket ID Number: EPA–HQ–OECA–2011–0263, EPA ICR Number 2071.05, OMB Control Number 2060–0522, expiration August 31, 2012.

Affected Entities: Entities potentially affected by this action are the owners or operators of printing, coating and dyeing of fabrics and other textiles.

Abstract: The affected entities are subject to the General Provisions of the NESHAP at 40 CFR part 63, subpart A, and any changes, or additions to the General Provisions specified at 40 CFR part 63, subpart OOOO.

Owners or operators of the affected facilities must submit initial notification, performance tests, and periodic reports and results. Owners or operators are also required to maintain records of the occurrence and duration of any startup, shutdown, or malfunction in the operation of an affected facility, or any period during which the monitoring system is inoperative. Reports, at a minimum, are required semiannually.

Burden Statement: The annual public reporting and recordkeeping burden for this collection of information is estimated to average 69 hours per response.

Respondents/Affected Entities: Owners or operators of printing, coating and dyeing of fabrics and other textiles.

Estimated Number of Respondents: 140.

Frequency of Response: Initially, occasionally, and semiannually.

Estimated Total Annual Hour Burden: 20,821.

Estimated Total Annual Cost: $1,687,784, which includes $1,680,832, in labor costs, $2,953 in capital/startup costs and $3,640 in operating and maintenance costs.

(53) NSPS for Secondary Source Compression Ignition Internal Combustion Engines (40 CFR Part 63, Subpart IIII), Docket ID Number: EPA–HQ–OECA–2011–0264, EPA ICR Number 2096.04, OMB Control Number 2060–0590, expiration August 31, 2012.

Affected Entities: Entities potentially affected by this action are the owners or operators of stationary source compression ignition internal combustion engines.

Abstract: The affected entities are subject to the General Provisions of the NSPS at 40 CFR part 60, subpart A, and any changes, or additions to the General Provisions specified at 40 CFR part 60, subpart IIII.

Owners or operators of the affected facilities must submit initial notification, performance tests, and periodic reports and results. Owners or operators are also required to maintain records of the occurrence and duration of any startup, shutdown, or malfunction in the operation of an affected facility, or any period during which the monitoring system is inoperative.

Burden Statement: The annual public reporting and recordkeeping burden for this collection of information is estimated to average 1 hour per response.

Respondents/Affected Entities: Owners or operators of stationary source compression ignition internal combustion engines.

Estimated Number of Respondents: 206,290.

Frequency of Response: Initially, and annually.

Estimated Total Annual Hour Burden: 192,197.

Estimated Total Annual Cost: $19,015,209, which includes $18,773,209 in labor costs, no capital/startup costs and $242,000 in operating and maintenance costs.

(54) NESHAP for Municipal Solid Waste Landfills (40 CFR Part 63, Subpart AAAA), Docket ID Number: EPA–HQ–OECA–2011–0265, EPA ICR Number 1938.05, OMB Control Number 2060–0505, expiration August 31, 2012.

Affected Entities: Entities potentially affected by this action are the owners or operators of municipal solid waste (MSW) landfills.

Abstract: The affected entities are subject to the General Provisions of the NESHAP at 40 CFR part 63, subpart A, and any changes, or additions to the General Provisions specified at 40 CFR part 63, subpart AAAA.

Owners or operators of the affected facilities must submit initial notification, performance tests, and periodic reports and results. Owners or operators are also required to maintain records of the occurrence and duration of any startup, shutdown, or malfunction in the operation of an affected facility, or any period during which the monitoring system is inoperative. Reports, at a minimum, are required semiannually.

Burden Statement: The annual public reporting and recordkeeping burden for this collection of information is estimated to average 5 hours per response.

Respondents/Affected Entities: Owners or operators of municipal solid waste landfills.

Estimated Number of Respondents: 1,121.

Frequency of Response: Occasionally, annually, and semiannually.

Estimated Total Annual Hour Burden: 18,234.

Estimated Total Annual Cost: $1,489,039, which includes $1,472,039 in labor costs, no capital/startup costs and $17,000 in operating and maintenance costs.

(55) NESHAP for Publicly Owned Treatment Works (40 CFR Part 63, Subpart VVV), Docket ID Number: EPA–HQ–OECA–2011–0266, EPA ICR Number 1891.06, OMB Control Number 2060–0428, expiration August 31, 2012.

Affected Entities: Entities potentially affected by this action are the owners or operators of publicly owned treatment works.

Abstract: The affected entities are subject to the General Provisions of the NESHAP at 40 CFR part 63, subpart A, and any changes, or additions to the General Provisions specified at 40 CFR part 63, subpart VVV.

Owners or operators of the affected facilities must submit initial notification, performance tests, and periodic reports and results. Owners or operators are also required to maintain records of the occurrence and duration of any startup, shutdown, or malfunction in the operation of an affected facility, or any period during which the monitoring system is inoperative. Reports, at a minimum, are required semiannually.

Burden Statement: The annual public reporting and recordkeeping burden for this collection of information is estimated to average 1 hour per response.

Respondents/Affected Entities: Owners or operators of publicly owned treatment works.

Estimated Number of Respondents: 6.

Frequency of Response: Initially, occasionally, annually, and semiannually.

Estimated Total Annual Hour Burden: 14.

Estimated Total Annual Cost: $1,114, which includes $1,114 in labor costs, no capital/startup costs and no operating and maintenance costs.

(56) NESHAP for Asphalt Processing and Asphalt Roofing Manufacturing (40 CFR Part 63, Subpart LLLLL), Docket ID Number: EPA–HQ–OECA–2011–0267, EPA ICR Number 2029.05, OMB Control Number 2060–0520, expiration August 31, 2012.

Affected Entities: Entities potentially affected by this action are the owners or operators of asphalt processing and asphalt roofing manufacturing facilities.

Abstract: The affected entities are subject to the General Provisions of the NESHAP at 40 CFR part 63, subpart A,

and any changes, or additions to the General Provisions specified at 40 CFR part 63, subpart LLLLL.

Owners or operators of the affected facilities must submit initial notification, performance tests, and periodic reports and results. Owners or operators are also required to maintain records of the occurrence and duration of any startup, shutdown, or malfunction in the operation of an affected facility, or any period during which the monitoring system is inoperative. Reports, at a minimum, are required semiannually.

Burden Statement: The annual public reporting and recordkeeping burden for this collection of information is estimated to average 223 hours per response.

Respondents/Affected Entities: Owners or operators of asphalt processing and asphalt roofing manufacturing facilities.

Estimated Number of Respondents: 24.

Frequency of Response: Initially, occasionally, and semiannually.

Estimated Total Annual Hour Burden: 12,017.

Estimated Total Annual Cost: $1,041,641, which includes $1,016,234 in labor costs, no capital/startup costs and $25,407 in operating and maintenance costs.

(57) NESHAP for Benzene Waste Operations (40 CFR Part 61, Subpart FF), Docket ID Number: EPA–HQ–OECA–2011–0268, EPA ICR Number 1541.10, OMB Control Number 2060–0183, expiration August 31, 2012.

Affected Entities: Entities potentially affected by this action are the owners or operators of benzene waste operations.

Abstract: The affected entities are subject to the General Provisions of the NESHAP at 40 CFR part 61, subpart A, and any changes, or additions to the General Provisions specified at 40 CFR part 61, subpart FF.

Owners or operators of the affected facilities must submit initial notification, performance tests, and periodic reports and results. Owners or operators are also required to maintain records of the occurrence and duration of any startup, shutdown, or malfunction in the operation of an affected facility, or any period during which the monitoring system is inoperative. Reports, at a minimum, are required semiannually.

Burden Statement: The annual public reporting and recordkeeping burden for this collection of information is estimated to average 71 hours per response.

Respondents/Affected Entities: Owners or operators of benzene waste operations.

Estimated Number of Respondents: 270

Frequency of Response: Initially, occasionally, quarterly, and semiannually.

Estimated Total Annual Hour Burden: 19,148.

Estimated Total Annual Cost: $1,738,751, which includes $1,738,751 in labor costs, no capital/startup costs and no operating and maintenance costs.

(58) NESHAP for Coke Oven: Pushing, Quenching, and Battery Stacks (40 CFR Part 63, Subpart CCCCC), Docket ID Number: EPA–HQ–OECA–2011–0269, EPA ICR Number 1995.05, OMB Control Number 2060–0521, expiration August 31, 2012.

Affected Entities: Entities potentially affected by this action are the owners or operators of coke oven: Pushing, quenching, and battery stacks.

Abstract: The affected entities are subject to the General Provisions of the NESHAP at 40 CFR part 63, subpart A, and any changes, or additions to the General Provisions specified at 40 CFR part 63, subpart CCCCC.

Owners or operators of the affected facilities must submit initial notification, performance tests, and periodic reports and results. Owners or operators are also required to maintain records of the occurrence and duration of any startup, shutdown, or malfunction in the operation of an affected facility, or any period during which the monitoring system is inoperative. Reports, at a minimum, are required semiannually.

Burden Statement: The annual public reporting and recordkeeping burden for this collection of information is estimated to average 229 hours per response.

Respondents/Affected Entities: Owners or operators of coke oven: pushing, quenching, and battery stacks.

Estimated Number of Respondents: 19.

Frequency of Response: Initially, occasionally, weekly, quarterly, and semiannually.

Estimated Total Annual Hour Burden: 25,879.

Estimated Total Annual Cost: $2,361,375, which includes $2,191,875 in labor costs, no capital/startup costs and $169,500 in operating and maintenance costs.

(59) NSPS for Petroleum Dry Cleaners (40 CFR Part 63, Subpart JJJ), Docket ID Number: EPA–HQ–OECA–2011–0270, EPA ICR Number 0997.10, OMB Control Number 2060–0079, expiration August 31, 2012.

Affected Entities: Entities potentially affected by this action are the owners or operators of petroleum dry cleaners.

Abstract: The affected entities are subject to the General Provisions of the NSPS at 40 CFR part 60, subpart A, and any changes, or additions to the General Provisions specified at 40 CFR part 60, subpart JJJ.

Owners or operators of the affected facilities must submit initial notification, performance tests, and periodic reports and results. Owners or operators are also required to maintain records of the occurrence and duration of any startup, shutdown, or malfunction in the operation of an affected facility, or any period during which the monitoring system is inoperative.

Burden Statement: The annual public reporting and recordkeeping burden for this collection of information is estimated to average 22 hours per response.

Respondents/Affected Entities: Owners or operators of petroleum dry cleaners

Estimated Number of Respondents: 18.

Frequency of Response: Initially.

Estimated Total Annual Hour Burden: 1,664.

Estimated Total Annual Cost: $134,355, which includes $134,163 in labor costs, $997 in capital/startup costs and $1,674 in operating and maintenance costs.

(60) NESHAP for Integrated Iron and Steel Manufacturing (40 CFR Part 63, Subpart FFFFF), Docket ID Number: EPA–HQ–OECA–2011–0271, EPA ICR Number 2003.05, OMB Control Number 2060–0517, expiration August 31, 2012.

Affected Entities: Entities potentially affected by this action are the owners or operators of integrated iron and steel manufacturing facilities.

Abstract: The affected entities are subject to the General Provisions of the NESHAP at 40 CFR part 63, subpart A, and any changes, or additions to the General Provisions specified at 40 CFR part 63, subpart FFFFF.

Owners or operators of the affected facilities must submit initial notification, performance tests, and periodic reports and results. Owners or operators are also required to maintain records of the occurrence and duration of any startup, shutdown, or malfunction in the operation of an affected facility, or any period during which the monitoring system is inoperative. Reports, at a minimum, are required semiannually.

Burden Statement: The annual public reporting and recordkeeping burden for this collection of information is estimated to average 419 hours per response.

Respondents/Affected Entities: Owners or operators of integrated iron and steel manufacturing facilities.

Estimated Number of Respondents: 18.

Frequency of Response: Initially, occasionally, and semiannually.

Estimated Total Annual Hour Burden: 18,421.

Estimated Total Annual Cost: $1,627,196, which includes $1,560,196 in labor costs, no capital/startup costs and $67,000 in operating and maintenance costs.

(61) State and Federal Emission Guidelines for Hospital/Medical/Infectious Waste Incinerators (40 CFR Part 60, Subpart Ce and 40 CFR Part 62, Subpart HHH), Docket ID Number: EPA–HQ–OECA–2011–0272, EPA ICR Number 1899.07, OMB Control Number 2060–0422, expiration September 30, 2012.

Affected Entities: Entities potentially affected by this action are the owners or operators of hospital/medical/infectious waste incinerators.

Abstract: The State and Federal Emissions Guidelines for hospital medical/infectious waste incinerators, 40 CFR part 60, subpart Ce, and 40 CFR part 62, subpart HHH.

Owners or operators of the affected facilities must submit initial notification, performance tests, and periodic reports and results. Owners or operators are also required to maintain records of the occurrence and duration of any startup, shutdown, or malfunction in the operation of an affected facility, or any period during which the monitoring system is inoperative. Reports, at a minimum, are required semiannually.

Burden Statement: The annual public reporting and recordkeeping burden for this collection of information is estimated to average 502 hours per response.

Respondents/Affected Entities: Owners or operators of hospital/medical/or infectious waste incinerators.

Estimated Number of Respondents: 57.

Frequency of Response: Initially, occasionally, annually, and semiannually.

Estimated Total Annual Hour Burden: 113,296.

Estimated Total Annual Cost: $9,628,648, which includes $7,447,273 in labor costs, $1,410,168 in capital/startup costs and $771,207 in operating and maintenance costs.

(62) NESHAP for Shipbuilding and Ship Repair Facilities—Surface Coating (40 CFR Part 63, Subpart II), Docket ID Number: EPA–HQ–OECA–2011–0273, EPA ICR Number 1712.07, OMB Control Number 2060–0330, expiration September 30, 2012.

Affected Entities: Entities potentially affected by this action are the owners or operators of shipbuilding and ship repair facilities.

Abstract: The affected entities are subject to the General Provisions of the NESHAP at 40 CFR part 63, subpart A, and any changes, or additions to the General Provisions specified at 40 CFR part 63, subpart II.

Owners or operators of the affected facilities must submit initial notification, performance tests, and periodic reports and results. Owners or operators are also required to maintain records of the occurrence and duration of any startup, shutdown, or malfunction in the operation of an affected facility, or any period during which the monitoring system is inoperative. Reports, at a minimum, are required semiannually.

Burden Statement: The annual public reporting and recordkeeping burden for this collection of information is estimated to average 255 hours per response.

Respondents/Affected Entities: Owners or operators of shipbuilding and ship repair facilities.

Estimated Number of Respondents: 56.

Frequency of Response: Initially, occasionally, and semiannually.

Estimated Total Annual Hour Burden: 28,594.

Estimated Total Annual Cost: $1,740,381, which includes $1,740,381 in labor costs, no capital/startup costs and no operating and maintenance costs.

(63) NESHAP for the Wood Building products Surface Coating Industry (40 CFR Part 63, Subpart QQQQ), Docket ID Number: EPA–HQ–OECA–2011–0274, EPA ICR Number 2034.05, OMB Control Number 2060–0510, expiration September 30, 2012.

Affected Entities: Entities potentially affected by this action are the owners or operators of wood building products surface coating facilities.

Abstract: The affected entities are subject to the General Provisions of the NESHAP at 40 CFR part 63, subpart A, and any changes, or additions to the General Provisions specified at 40 CFR part 63, subpart QQQQ.

Owners or operators of the affected facilities must submit initial notification, performance tests, and periodic reports and results. Owners or operators are also required to maintain records of the occurrence and duration of any startup, shutdown, or malfunction in the operation of an affected facility, or any period during which the monitoring system is inoperative. Reports, at a minimum, are required semiannually.

Burden Statement: The annual public reporting and recordkeeping burden for this collection of information is estimated to average 109 hours per response.

Respondents/Affected Entities: Owners or operators of wood building products surface coating facilities.

Estimated Number of Respondents: 232.

Frequency of Response: Initially, occasionally, and semiannually.

Estimated Total Annual Hour Burden: 75,771.

Estimated Total Annual Cost: $6,695,925, which includes $6,417,525 in labor costs, no capital/startup costs and $278,400 in operating and maintenance costs.

(64) NESHAP for Hydrochloric Acid Production (40 CFR Part 63, Subpart NNNNN), Docket ID Number: EPA–HQ–OECA–2011–0275, EPA ICR Number 2032.07, OMB Control Number 2060–0529, expiration September 30, 2012.

Affected Entities: Entities potentially affected by this action are the owners or operators of hydrochloric acid production facilities.

Abstract: The affected entities are subject to the General Provisions of the NESHAP at 40 CFR part 63, subpart A, and any changes, or additions to the General Provisions specified at 40 CFR part 63, subpart NNNNN.

Owners or operators of the affected facilities must submit initial notification, performance tests, and periodic reports and results. Owners or operators are also required to maintain records of the occurrence and duration of any startup, shutdown, or malfunction in the operation of an affected facility, or any period during which the monitoring system is inoperative. Reports, at a minimum, are required semiannually.

Burden Statement: The annual public reporting and recordkeeping burden for this collection of information is estimated to average 451 hours per response.

Respondents/Affected Entities: Owners or operators of hydrochloric acid production facilities.

Estimated Number of Respondents: 75.

Frequency of Response: Initially, occasionally, and semiannually.

Estimated Total Annual Hour Burden: 94,104.

Estimated Total Annual Cost: $8,647,612, which includes $7,959,759 in labor costs, $53,500 in capital/startup costs and $634,353 in operating and maintenance costs.

EPA will consider any comments received and may amend any of the above ICRs, as appropriate. Then, the final ICR packages will be submitted to OMB for review and approval pursuant to 5 CFR 1320.12. At that time, EPA will issue one or more **Federal Register** notices pursuant to 5 CFR 1320.5(a)(1)(iv) to announce the submission of the ICRs to OMB and the opportunity to submit additional comments to OMB. If you have any questions about any of the above ICRs or the approval process, please contact the person listed under **FOR FURTHER INFORMATION CONTACT**.

Dated: April 21, 2011.

Lisa C. Lund,

Director, Office of Compliance.

[FR Doc. 2011–11017 Filed 5–6–11; 8:45 am]

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FEDERAL REGISTER

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No. 89 May 9, 2011

Part V

The President

Proclamation 8668—50th Anniversary of the Freedom Rides

Federal Register
Vol. 76, No. 89
Monday, May 9, 2011

Presidential Documents

Title 3—

The President

Proclamation 8668 of May 3, 2011

50th Anniversary of the Freedom Rides

By the President of the United States of America

A Proclamation

Fifty years ago, America was struggling to implement the ideals of justice and equality set forth in our founding. The Freedom Rides, organized in the spring of 1961, were an interracial, nonviolent effort to protest the practice of segregation. Setting out from Washington, D.C., on May 4, 1961, the Freedom Riders sought to actualize the decision in *Boynton v. Virginia*, which held that interstate passengers had a right to be served without discrimination, and to challenge the enforcement of local segregation laws and practices.

The Freedom Rides, organized by the Congress of Racial Equality (CORE), the Student Nonviolent Coordinating Committee (SNCC), and other devoted advocates, built upon the boycotts and sit-ins that were defying Jim Crow segregation across the South. The Freedom Riders themselves were black and white, often students and young people, and committed to the cause of nonviolent resistance. Along the way, buses were attacked and men and women were intimidated, arrested, and brutally beaten. The publicity generated by the courageous Freedom Riders as they faced continued violence and complicit local police drew the attention of the Kennedy Administration and Americans across our country.

Through their defiant journeys, the Freedom Riders sent a resounding message to the rest of our Nation that desegregation was a moral imperative. The Freedom Riders also motivated and mobilized the next generation of civil rights leaders. The unflinching bravery and unyielding commitment of the Freedom Riders inspired many of those involved to become lifelong activists, organizers, and leaders in the civil rights movement.

Today, we remember the Freedom Riders for the sacrifices they made in pursuit of the rights we now enjoy. They showed that people working together across backgrounds and boundaries could hold America accountable to our highest ideals and bend the arc of history towards justice. They showed that young people have the power to generate a movement for equality and steer the course of our Nation. Because of their efforts, and the work of those who marched and stood against injustice, we live in a country where all Americans have the right to dream and choose their own destiny.

NOW, THEREFORE, I, BARACK OBAMA, President of the United States of America, by virtue of the authority vested in me by the Constitution and the laws of the United States, do hereby proclaim May 2011 as the 50th Anniversary of the Freedom Rides. I call upon all Americans to participate in ceremonies and activities that honor the Freedom Riders and all those who struggled for equal rights during the civil rights movement.

IN WITNESS WHEREOF, I have hereunto set my hand this third day of May, in the year of our Lord two thousand eleven, and of the Independence of the United States of America the two hundred and thirty-fifth.

[FR Doc. 2011–11488
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S. 307/P.L. 112–11
To designate the Federal building and United States courthouse located at 217 West King Street, Martinsburg, West Virginia, as the ''W. Craig Broadwater Federal Building and United States Courthouse''. (Apr. 25, 2011; 125 Stat. 213)

S.J. Res. 8/P.L. 112–12
Providing for the appointment of Stephen M. Case as a citizen regent of the Board of Regents of the Smithsonian Institution. (Apr. 25, 2011; 125 Stat. 214)

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